A TREATISE

ON THE

EXAMINATION OF TITLES

TO

REAL ESTATE

AND THE

PREPARATION OF ABSTRACTS.

WITH AN APPENDIX OF FORMS.

BY W. B. MARTINDALE,

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SECOND EDITION: REVISED AND ENLARGED.

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PREFACE TO THE FIRST EDITION.

The preparation of this work was begun some years ago, but before publication, the writer discovered that he had fallen into the common error of indulging in frequent and extended digressions, discussing principles of law, to the obscurement of the primary object of the work. The subject is, of course, inseparably connected with the Law of Real Property, but involving as it does this entire branch of jurisprudence, discussion of its principles, within the limits of a single volume, was found to be impracticable. The original topic was, therefore, eliminated and the first publication confined to a treatise on the Law of Conveyancing. The success of that work seemed to warrant the publication of the present volume—the object of which is, to suggest the points to which attention is to be drawn in the examination of titles and to state the method of preparing abstracts. In its preparation, the writer has made liberal extracts from the early English writers on the subject, where applicable to the present state of the law in this country, but it must be admitted that very little of value in the way of precedent is to be found, on which to formulate a work of this character.

For the want of a better term the word ABSTRACTOR has been made use of to designate the person who prepares an abstract, which has not been sanctioned by any recognized authority. The employment of some such word seemed to be essential to clearness of expression, as that of examiner is a more general term and is applied with equal propriety to different classes of persons who engage in the investigation of titles.

W. B. MARTINDALE.

KENOSHA, Wis., September 1, 1885.

PREFACE TO THE SECOND EDITION.

The rapid and successful sale of the first edition of this work seemed to the publishers, to justify a second. Though not as large as some existing works upon the same topic, it can be said that it embraces in clear and plain style a complete view of the subject of Abstracts of Title, considered from a practical stand-point, and does not pretend to discuss questions already embraced in the author's work on conveyancing. In other words, it is a complete treatise on the subject of Abstracts of Title, the manner of preparing and examining the same, and the questions incident thereto, and it is in no sense a work on Conveyancing or Real Property, of which some existing works on Abstracts of Title are largely composed. The editor of the present edition has had in mind its practical character and has added those things which to him seemed useful in that direction. New cases have been added to the text throughout. Some new chapters have been written, notably those on "The Right to Search the Records," "Object of an Abstract," "Relinquishment of Dower by Power of Attorney." Besides this, considerable has been added to the chapter on "Abstract of a Purchase Deed," and here and there throughout the book. The editor trusts that his labors have not been altogether in vain.

LYNE S. METCALFE, JR.

St. Louis, July, 1890.

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ABSTRACTS OF TITLE.

CHAPTER I.

INTRODUCTORY.

SECTION.

§ 1. **Historical.**—The history of the practice of preparing Abstracts of Title, is almost contemporaneous with that of the requirement of a formal instrument in writing for the conveyance of real estate. When the title to lands came to depend chiefly upon documentary evidence, or, at least, when the forms of the assurances had grown to such length as to be cumbersome to examine, a brief summary of the important parts of such documents became necessary to enable purchasers, or their counsel, the more readily to pass upon the sufficiency of the title.

Before the recording acts in England, all deeds passed with the possession of the property, and it was the duty of the conveyancer employed, to examine the conveyances and prepare an abstract of the title. This constituted an important part of the learning of conveyancing—"a highly

artificial system of rules and practice which maintained its own separate body of practitioners."[1] In this country the tendency has been to a loose and incoherent practice in the examination of titles and the drawing of conveyances, and few practitioners take the trouble to inform themselves in the nice distinctions and technical discriminations, with which the law of conveyancing abounds. Says Judge COOLEY, in the Introductory to his excellent edition of Blackstone:[2] "Real estate has been cheap; we have been near the sources of title; conveyances of any particular parcel have not generally been numerous, nor the title complicated; the modes of transfer have been tolerably uniform and well understood; we have a general system of registry designed to give purchasers information concerning the conveyances which have been made; and as every man of plain common sense is able to understand all these, one naturally comes to think that the nearest justice of the peace is competent to transact the business connected with his purchases and sales, and that his own good sense is sufficient to protect him against flaws in titles, or against being entrapped through the means of inadequate conveyances of the land he buys. Unfortunately he sometimes discovers, when too late, that unaided good sense is not always an infallible guide in matters of law, and that one who relies on it, implicitly, is in the proper condition of mind to be made the victim of misplaced confidence. Many a man has lost his all by assuming the sufficiency of his own knowledge and judgment in real estate matters, and by resting satisfied with his own examination or that of his county register of deeds, where he ought to have called in the best legal advice that was attainable. Sharp schemers do not overlook this fact, and many of them thrive by it; but we should be obliged to confess, if interrogated on that point, that many legal practitioners also do not properly appreciate the nature of their task when called upon to advise regarding titles, and that the assistance

[1] 1 Steph. Con. 466; Burril's Law Dic., *Conveyancing*.
[2] Page xvi.

they assume to render is admirably calculated to lead astray."

§ 2. **Definition.**—An abstract of title, or a brief of title, as it is sometimes called, is a short methodical summary of the documents and facts which affect the title to a piece of land.[1] The following apt and clear definition of the term has been given: "In conveyancing an abstract or summary of the most important part of the deeds and other instruments composing the evidences of a title to real estate, arranged usually in chronological order, and intended to show the origin, cause and incidents of the title, without the necessity of referring to the deeds themselves. It also contains a statement of all charges, incumbrances, liens and liabilities to which the property may be subjected, and of which it is, in any way, material for purchasers to be apprized."[2] In succinct language an abstract may be defined as a concise statement of the record evidence of one's title or ownership in realty.[3] An abstract, ordinarily, means a mere brief and not a copy of that from which it is taken.[4]

§ 3. **Object of the Abstract.**—Whenever a contract for the sale or mortgaging of land is made, it is implied that the seller or mortgagor will, before the completion of the contract, show a good marketable title to the property which he proposes to sell or mortgage, and until he does so, the purchaser or mortgagee is not bound to accept a deed or pay the purchase money or mortgage money.[5] The object of the abstract is to enable the purchaser or his counsel to pass more readily on the sufficiency of the title. As a general rule, it makes but little difference what the precise terms of the contract are—whether the vendor agrees to make title or a good title—or to make a deed or

[1] Amer. & Eng. Encyc. of Law, 46.

[2] Burrill's Law Dictionary, 12. And see Banker v. Caldwell, 3 Minn. 94; 2 Sugden on Vendors, 57.

[3] Anderson's Law Dictionary, 9.

[4] Dickinson v. Railroad Co., 7 W. Va. 413.

[5] Shreck v. Pierce, 3 Iowa, 360.

a warranty deed—if it appears that he is negotiating to sell at a sound price, to be paid or part paid at the conveyance. In such cases, usually, the vendor without a nice examination of words, is understood to agree for a good title, and the vendee cannot be put off with merely a good deed. This rule, however, does not include those cases where the vendee appears to be purchasing the vendor's title, such as it may be.[1]

When the vendor contracts to give a warranty deed, he cannot, if the vendee is willing to accept it, refuse to execute and deliver such a deed on the ground that his title being disputed he could not, in good faith, do so.[2]

§ 4. **An Abstract Should Contain What.**—The object of every abstract of title is to enable the purchaser, mortgagee, or party in interest, to judge of the evidence deducing, and of the incumbrances affecting the title. It should, therefore, exhibit whatever tends to aid the parties in forming an opinion of the precise state of the title, at law and in equity, together with all chances of eviction and adverse claims. If the title is perfect, and supported by sufficient evidence, this should appear affirmatively. On the other hand, if there is any necessary evidence wanting, or if there are omissions, mistakes or irregularities, these ought also to be plainly exhibited. The abstract should contain a clear statement of the material parts of all patents, deeds, wills, judicial proceedings, and other records or documents affecting the title, as well as all liens and incumbrances of whatever nature, and also all facts which fill up the interval of title, commonly called matters *in pais*, such as births, majorities, marriages, descents and successions, connecting the several transactions, or otherwise operating upon the title. All facts which are stated should be stated correctly, and the parties should be prepared to verify or authenticate

[1] Shreck v. Pierce, 3 Iowa, 360; Clarke v. Redman, 1 Blackf. 379; Esfry v. Anderson, 14 Pa. St. 308; Clute v. Robinson, 2 John. 595; Jones v. Gardner, 10 *Ib.* 266; Robb v. Montgomery, 20 *Ib.* 13.

[2] Hartzell v. Crumb (Mo.), 3 S. W. Rep. 59.

them by legal evidence, to which reference is to be had in the abstract.

It is believed, however, to be the common practice in this country to set out in an abstract such facts only as appear upon the public records, and perhaps an abstractor would not be liable to an action of damages for omitting from the abstract any matter not appearing upon such records.[1] But there are many things that do not appear of record, which may affect the title and, if not stated in the abstract, must be looked to by the purchaser or his counsel. In the following presentation of the subject, our remarks will not be confined to that which an abstractor would be bound by his implied contract to furnish, nor to the usual customs of those engaged in the practice, but our effort will be to suggest the principal points to which attention is to be drawn in the examination of titles, and to state the method of setting them out in an abstract.

§ 5. **Implied Contract on Part of Vendors.**—In England there is an implied contract on the part of every vendor of a freehold estate in land, to furnish the intended purchaser an abstract of the title.[2] Although the vendor should think fit to deliver the deeds to a purchaser as a substitute for an abstract, the purchaser would have a right to require the vendor to take back the deeds, and insist on an abstract at the vendor's expense.[3] And, in the absence of an express agreement to the contrary, a purchaser who has not been in possession is bound to pay interest on the purchase money, and take the rents and profits only from the time when a good title is first shown, and not from the time fixed by the agreement for the completion of the purchase.[4] In Louisiana it was held that a vendor of land to be free from incumbrance cannot exact the price, until, besides signing and delivering an act of sale, he has produced the tax re-

[1] See Chase v. Heaney, 70 Ill. 268.
[2] Wms. Real Prop. 428.
[3] 1 Prest. Abst. 34.
[4] 1 Chitty's Gen. Prac. 298.

ceipts and mortgage certificate, showing that the property is free and unincumbered.[1] But as a general rule, in this country, the implied obligation of a vendor extends no further than to his ability to make a marketable title. It is well settled that a purchaser cannot be compelled to accept a doubtful or incumbered title;[2] but it devolves upon him to show that the title for which he has contracted is doubtful or bad. Thus, in Pennsylvania, it was held, that to put the purchaser in default, it was not necessary for the vendor to tender the whole chain of title, but that it was the duty of the purchaser to examine for himself.[3]

§ 6. **Title Should be Investigated Before Sale is Contracted.**—It often happens that a defect in the title disclosed to a purchaser, leads to a claim by a person who may assert a title founded on this defect; it is, therefore, a very prudent caution on the part of sellers, to have their title thoroughly investigated by their own counsel, before they offer their lands for sale, so that they may be satisfied that there is no reasonable chance of exposing their title to a successful claim, or even to a troublesome and expensive litigation. Nor is this the only advantage to be derived from such a previous investigation, under the advice of those who are conversant with the subject. The formal difficulties with which the title may be attended may be pointed out; the necessary steps may be taken to remove the cloud; or, if the defect be found insurmountable, provision may be made in the conditions of sale against the production of proof of any deed or other fact, so far as to compel a purchaser to accept a conveyance without the same.[4] As a consequence of the want of such precaution

[1] Faisans v. Moore, 11 La. Ann. 741.

[2] Shreck v. Pierce, 3 Clark (Iowa), 350; George v. Conhaim (Minn.), 37 N. W. Rep. 791.

[3] Espy v. Anderson, 14 Pa. St. 308. In this case it was held sufficient to prove that a certain judgment against the property had been paid, though not satisfied of record.

[4] A condition intended to relieve the vendor from liability to deduce a marketable title, and verify the abstract by proper evidence at his own expense, must be expressed in plain and unambiguous language. Os-

in having the title examined, and all matters of dispute growing out of it settled, before entering into a contract, delay is often occasioned, interest on purchase money lost, and expensive litigation incurred in seeking to enforce or resist specific performance of the agreement.[1]

It would be a wise precaution on the part of real estate agents and brokers, to adopt a rule requiring sellers to furnish an abstract of their titles before placing the property upon the market, in order that they might be enabled to protect the interests of their clients in contracting for its sale, and that buyers might know what title they were negotiating for; besides this, a sale is often defeated in the time it takes to prepare an abstract, where one has not been prepared in advance. Moreover, an abstractor should not be compelled to make a hurried search.

§ 7. **By Whom the Abstract is to be Prepared.**—When no abstract has been previously prepared nor provided for in the conditions of sale, according to the English practice, it is the duty of the solicitor for the vendor to prepare the abstract, and of the solicitor of the purchaser to compare the same with the evidences of title.[2] In this country it more frequently happens that the same abstractor acts in the capacity of solicitor for both vendor and purchaser in the preparation of the abstract; though he is commonly employed by the grantor. It is always advisable, however, that the purchaser should employ his own counsel, whose duty it is to see that the abstract is supported by sufficient evidence, to consider the deduction of the title, and call for such information as shall appear requisite and necessary to elucidate the real state of facts concerning the title. And this is more particularly important in view of the fact that the abstractor may be put upon notice of some fact which he wilfully or negligently fails to set out in the abstract, and notice to the agent is notice to the principal, although

borne v. Harvey, 7 Jur. 229; Nash v. Browne, 9 Jur. N. S. 411; 1 Sugd. Vend. (Perk. ed.) 507.

[1] 1 Chitty's Gen. Prac. 295, 298.

[2] 1 Prest. Abst. Tit. 1.

he be the agent of both parties.[1] It is suggested by Mr. SUGDEN, that a purchaser, not being himself a professional man, who employs no attorney, will find it difficult to establish that the attorney of the seller did not act for him.[2]

Where searches for incumbrance are to be made by public officers, it is advisable for the intended purchaser to procure the requisite searches to be made, as there would then be no question about the officer being liable to him for damages in case he gave a false certificate. The same consideration would suggest the propriety of the purchaser procuring his own abstract and searches generally. The liability of examiners of titles, will be discussed in a future chapter.

§ 8. **At whose Expense the Abstract is to be Made and Conveyances Drawn.**—In transactions between vendors and purchasers it is always competent for the parties to make such stipulations as they please, with respect to the expense of investigating the title and preparing the instruments of conveyance. But when there is no previous agreement between the parties on this point, the matter of expense attending the conveyance is to be settled by the general usage of the country.

When the property of an individual is taken for public use, under the exercise of the right of eminent domain, or by virtue of any statute, the general rule is, that the expense of the proceeding shall be borne exclusively by the party for whose benefit the property is taken. The party whose title is forcibly wrested from him, is required to be recompensed in money for its value, without being liable for costs.[3] But when a sale and conveyance is voluntarily made and entered into for any such purpose, no reason is perceived why the transaction should not be governed by the same rules that apply between vendors and purchasers gen-

[1] 1 Sugd. V. & P. (8 Am. ed.), 530.
[2] *Ibid.* 531.
[3] 1 Sugd. V. & P. (Perk. ed.), 125.

erally. But in England, where property is purchased by a railroad company the expense of the abstract is borne by the company, whether the sale be voluntary or compulsory. This rule, however, appears to depend upon statutory provisions.[1]

When a mortgage is given as security for a loan, the attorney of the mortgagee commonly prepares the security, as the money advanced is that of the mortgagee, and it is his interest that is to be protected. But the expense of preparing the security, and of making the requisite searches and abstracts, must be borne by the mortgagor. "The lender is entitled to his money loaned and the legal interest, which he would not get if he had to bear the expenses of the searches, examination of titles and preparation of the securities."[2] In the case of a mortgage given for the consideration money of the lands mortgaged, there is seldom any occasion for a search being made for incumbrances against the mortgagor. This is especially true where the conveyance and mortgage back constitute parts of the same transaction, as no incumbrance against the vendee will attach upon an instantaneous seizin, which is immediately conveyed back to the vendor by way of mortgage.[3] "In this class of cases," says Mr. WILLARD, "it is usual for the parties to share the expense: the vendor paying for the preparation of the deed and for the search for incumbrances on the estate, and the vendee for the bond and mortgage given for the whole, or some part of the purchase money."[4]

In ordinary transactions between vendors and purchasers, when the contract between the parties is silent upon the subject, it is believed that the rule commonly adopted in this country is, for the vendor to prepare the title deeds, and to cause the requisite searches and abstracts to be made at his own expense.[5] But in England the rule is, that the expense of the conveyance must be borne by the purchaser,

[1] Dart. on Vend. & P. 131.
[2] Willard on Real Est. & Conv. 559.
[3] Martindale on Conv. (2d ed.), 155, 158. and cases cited.
[4] Willard on Real Est. and Conv., 559.
[5] Connelly v. Pierce, 7 Wend. 131; Carpenter v. Brown, 6 Barb. 149.

unless there has been some different express stipulation on the subject.[1] The same rule is said to prevail in some of the States in this country.[2]

The question as to whether it is the duty of the vendee to prepare and tender the conveyance to the vendor to be executed, in order to put the latter in default, is governed largely by the rule as to whose duty it is to pay the expense of preparing the conveyance. Thus, in England, the purchaser is bound to tender the conveyance;[3] but in New York, where it is the duty of the vendor to pay the expense of the conveyance, it has been held that the purchaser may put the vendee in default by demanding the conveyance and waiting a reasonable time for its preparation, or he may himself prepare the deed and present it to the vendee for execution—though if the purchaser voluntarily prepares the deed himself, it must be at his own expense.[4]

§ 9. **Ownership of the Abstract.**—Mr. Coppinger, in his work on Title Deeds[5] (London, 1875), says: "As to the general property in the abstract, while the abstract is open, it is neither in the vendor nor in the purchaser absolutely: if the sale go on, it becomes the property of the purchaser; if off, the property of the vendor. In the meantime the purchaser has the temporary property, and a right to keep it, even if the title be rejected, until the dispute be finally settled, for his own justification, in order to show on what ground he did reject the title. He has a right to retain it also for the purpose of taking counsel's opinion upon it—for the purpose of further investigation of the title, and of preparing the conveyance or other assurance therefrom. But whenever the purchaser finally rejects the title, and rescinds the contract, and there is no dispute as to the right of the purchaser to so reject the title and rescind the con-

[1] 1 Sugd. Vend. (Perk. ed.), 309.

[2] *Ibid.* 310, note.

[3] 1 Sugd. Vend., (Perk ed.) 309.

[4] Connelly v. Pierce, 7 Wend. 130. See Fuller v. Hubbard, 6 Cow. 13; Hudson v. Jewett, 20 Johns. 24; Hackett v. Huson, 3 Wend. 249.

[5] Page 37.

tract, not only has the abstract to be returned, but no copies or extracts therefrom must be kept, as the retention by the intended purchaser of such copies or extracts might injuriously affect the title of the vendor." The foregoing propositions are supported by the cases below cited.[1]

§ 10. **Right to Search the Records.**—The question has arisen, in many of the States, as to the right of abstractors of titles and of the public generally to search the public records and make memoranda thereof. The deduction from all the authorities on this subject is, that the clerk or the lawful custodian of the records and the indexes thereof is responsible for their safe-keeping. His power over them is such as is necessary for their protection and preservation. To that end he may make and enforce proper regulations consistent with the public right for the use of them, but they are public property for public use, and he has no lawful authority to exclude any of the public from access to and inspection and examination thereof at proper seasons and on proper application. And in most instances and in the absence of statute, the clerk or custodian has no right to demand any fee for the privilege of access to the records and indexes, or for any examination thereof not made by himself or his assistants. He has no exclusive right to search the record.[2] In most of the States statutes are in existence which to a greater or less extent requires the custodian of the records to allow such search and in the majority of them the doctrine has been established in accordance with the above statement of the law.[3] It has been held in Wisconsin that the words "any person" in the statute includes every person.[4] In that case the contention

[1] Roberts v. Wyatt, 2 Taunt. 288; Langlow v. Cox, 1 Chit. 98.

[2] See opinion of Runyon, C., in Lum v. McCarty, 39 N. J. Law, 287. In this case the party refused was an attorney not engaged in abstracting, and had been refused access to the records until he paid the fee chargable if the clerk had made the search.

[3] Boylan v. Warren, 39 Kan. 301; Cole v. Rachac, 37 Minn. 372; German Loan and Trust Company v. Richards, 99 N. Y. 620; Hanson v. Eichstaedt, 69 Wis. 538.

[4] Hanson v. Eichstaedt, 69 Wis. 538.

was made that the words of the statute were only applicable to a particular class of persons, as for instance, those only who are interested in the particular piece of land the record of which is sought to be inspected or copied. In a few of the States the right of the public to inspect public records though not denied has been somewhat limited. Thus, in Kansas,[1] it was held that parties have no vested right in the examination of a record of title or other public records save by some interest in the land or subject of record, and that the register of deeds will not be compelled by *mandamus* to permit any person to make copies of the entire records in his office for the purpose of making a set of abstract books for private use or speculation. VALENTINE, J. says: "The refusal of the officer in charge to permit a person to gratify a mere idle curiosity, or to examine the records for the mere purpose of taking copies or memoranda thereof for some supposed possible use in the future, or to examine the records when they are otherwise rightfully and properly in use by some person can constitute a basis for another kind of action. Some present and existing right of a person must be infringed to the injury of such person before any cause of action of any kind can accrue in his favor." But in a later case[2] the court was careful to say: "Before closing this opinion it would perhaps be proper to state that any person, even an abstractor of titles, who may have sufficient interest in the information to be obtained from the public county records to entitle him to an examination of the same, may, if he chooses, make copies, abstracts, or extracts or memoranda therefrom. There is no statute and no good reason against it." The same denial of inspection of the records of a probate judge on the ground that the purpose was speculative or from idle curiosity was reached in Alabama.[3] There, though the

[1] Cormack v. Wolcott, 37 Kan. 391; Boylan v. Warren, 39 Kan. 301.

[2] Boylan v. Warren, *supra*.

[3] Randolph v. The State, 82 Ala. 527. And see the previous case of Brewer v. Watson, 71 Ala. 299; Phelan v. The State, 76 Ala. 49.

right of inspection was admitted, the reasonable limitation was made that the inspector must not obstruct the officers in charge in the performance of their official duties by withholding the records from them when needed for the performance of an official function. Nor was this right of examination there confined to persons claiming title or having a present pecuniary interest in the subject-matter. The right of free examination was declared to be the rule, and the inhibition of such privilege when the purpose is speculative or from idle curiosity was the exception. The same conclusion was reached in Georgia.[1] And at common law it is stated that there was no general or public right of inspection of public records,[2] and in the absence of statute it may be that the public have no such right of access. It was so held in some of the earlier Michigan cases,[3] but a very recent case in that State[4] overrules the previous decisions of Webber v. Townley,[5] and lays down the doctrine in substance as stated at the beginning of this section. The court even went to the length of declaring the right of the public to inspect certain records kept by a register, which records were not required by law to be kept. It is there held that a municipal corporation can have no private books, not even of accounts, that are not open to the inspection of its citizens without charge. The court in denying that it has ever been a common-law rule in the United States that the public had no right of free access to the public records and to the public inspection thereof, held that a public officer has no exclusive right as against other citizens to search the records in his charge, and that he has no right to exact fees for searches made unless they are made by

[1] Buck v. Collins, 51 Ga. 391.

[2] 1 Greenl. on Ev., § 473.

[3] Webber v. Townley, 43 Mich. 534. And see Diamond Match Company v. Powers, 51 Mich. 145.

[4] Burton v. Tuite, 44 N. W. Rep. 282. And see this case reported in full in 29 American Law Register 49, with very exhaustive note by John B. Uhle, Esq., of which we have made liberal use in the preparation of this section.

[5] *Supra*.

himself or his subordinates. The decisions in New York all sustain the general doctrine that the limitation on the exercise of the right of inspection must be reasonable, and in the exercise of his discretion subject to the right of the custodian to preserve and maintain the records and to transact the public business expeditiously and without interference.[1] In Colorado, the court held that the statute was not designed to allow individuals who wish to abstract the entire records for future profit in their private business the privilege of using continuously the public property and of monopolizing from day to day a portion of the time and attention of a public officer.[2] But with these limitations, established with a view to the preservation and safe-keeping of the records, and the security of the custodian from interference or enforced neglect of duties, the right of access on the part of abstractors and others, to public records cannot be denied and may be enforced by action.

§ 11. **Preliminary.**—Before proceeding it is thought proper to consider first, what is to be regarded as the foundation of title, and in what cases it is necessary to extend the search back to the original starting point, and in what it is not.

[1] People v. Reilly, 45 Hun, 429; People v. Cornell, 47 Barb. 329; People v. Richards, 99 N. Y. 620.

[2] Bean v. The People, 7 Cal. 200.

CHAPTER II.

ORIGINAL SOURCES OF TITLE.

§ 13. **The United States or State Government** is usually accepted as the original source of title to all lands in this country,[1] and in all ordinary cases no inquiry will be required to be made back of a patent from either of these sources. The exceptions to this rule will be noticed as we proceed.

§ 14. **As to Indian Titles.**—The only title to the soil that has ever been recognized in the aboriginal inhabitants of this country is that of occupation. This right has generally been respected until it has been extinguished by purchase or conquest, under authority of the nation exercising dominion over them; but they have not been permitted to alienate their possession, except to the nation to which they were thus bound by a qualified dependence. The Indian title is subordinate to the absolute ultimate title of the government;[2] and no grant from an Indian tribe to an

[1] Upon the annexation of Texas the public domain was reserved to the State. In other portions of the United States, with few exceptions, the general government is to be taken as the original source of title to all lands constituting a part of the public domain at the time of the acquisition of the territory in which it is embraced.

[2] Johnson v. McIntosh, 8 Wheat. 543; Mitchell v. United States, 9 Pet. 712; United States v. Fernandez, 10 Pet. 303; United States v. Rillieux's Heirs, 14 How. 189; Sparkman v. Porter, 1 Paine (U. S.), 457.

individual is recognized in our courts[1]—except in those few cases where purchases have been made at Indian treaties, held under authority of the government. Such purchases are rendered valid by their ratification, without any patent from the United States.[2] But none of the nations who planted colonies here seem to have recognized any title in the native tribes, beyond the right of occupation. They recognized no seizin of lands on the part of Indian dwellers upon it, and the Indian's deed was simply regarded as an extinguishment of his claim and not as passing the soil. The title gained by the grantee under it grew out of his making an actual entry upon the land under a claim of title. It is accordingly true, that in none of the English patents making grants of the country is the Indian title excepted; and even Penn had begun to fix his settlement under his patent before he conferred with the Indians as to the lands.[3]

§ 15. **Titles Derived from Foreign Governments,** while the territory was under their dominion, have, generally, been regarded as *inchoate* only, until confirmed by the United States. In the purchase of Florida the treaty operates as a confirmation of all perfect titles.[4] But titles granted upon conditions not performed, and for the non-performance of which no excuse is shown, are void as against the government.[5] The treaty for the purchase of Louisiana imposed only a political obligation upon the government of the United States to perfect incomplete titles originating under France and Spain, which cannot be enforced by the courts.[6] The acts of commissioners to

[1] Sparkman v. Porter, 1 Paine (U. S.), 457.

[2] Mitchell v. United States, 9 Pet. 713.

[3] 3 Wash. on Real Prop. (5th ed.) 194. But see "Indian Titles," 13 Alb. L. J. 28.

[4] United States v. Perchman, 7 Pet. 51; United States v. Clark, 9 Pet. 168; Mitchell v. United States, 9 Pet. 712; Smith v. United States, 10 Pet. 326; United States v. Clarke's Heirs, 16 Pet. 228; Les Bois v. Bramell, 4 How. 449.

[5] United States v. Wiggins, 14 Pet. 334; United States v. King, 7 How. 833.

[6] McCay v. Dillon, 7 Mo. 7.

adjust land titles in this territory have generally been held conclusive as to all titles confirmed according to law.[1] But where the contest was between a French and Spanish title, a patent from the United States was held not to affect the rights of the other party.[2] By the treaty of cession from Mexico in which California was acquired, the United States were bound to protect all titles to land, legal or equitable, perfect or imperfect.[3] Under act of 1851, the United States declared the conditions upon which they would discharge these obligations to Mexican grantees. But the confirmation of a claim under this act, even when followed by a patent, is not conclusive of the equitable rights of third parties. They may assert their rights in a court of equity against the patentee and parties claiming under him, with notice.[4] But such notice must be actual. When a Mexican grant has been confirmed and a patent issued to parties claiming under a defective derivative title a *bona fide* purchaser from them is not chargeable with constructive notice of the invalidity of such derivative title.[5]

[1] Strothers v. Lucas, 12 Pet. 412; Landers v. Brant, 10 How. 348; Robinson v. Minor, 10 How. 627; Dent v. Emmeger, 14 Wall. 308. A confirmation to a grantee or his legal representatives, embraces representatives by contract, as well as by operation of law; and in such cases the question as to whom the confirmation should inure, is open in a court of justice. Hogan v. Page, 2 Wall. 605.

[2] New Orleans v. De Armas, 9 Pet. 224.

[3] Hornsby v. United States, 10 Wall. 224. See Beard v. Federy, 3 Wall. 479; United States v. Cambuston, 20 How. 59.

[4] Meader v. Norton, 11 Wall. 442.

[5] Hardy v. Harbin, 1 Saw. 114. See United States v. Sanchez, Hoff L. Cas. 133; United States v. Billings, 2 Wall. 444.

CHAPTER III.

HOW FAR BACK THE ABSTRACT SHOULD EXTEND.

SECTION.

§ 17. **Need not Date From Patent, When.**—In the older States it is sometimes impracticable to date the abstract from the original patent. In such cases it is usual to require the title to be shown for a period of forty years, at least. In England, the practice is to take the commencement of the title so as to show the state of the evidence for a period of sixty years; and in many cases it is material to carry back the title to even a more remote period.[1] It is said that the period of sixty years is derived from the analogy to the statutes of limitations against a writ of right, which was fixed at that period.[2] The application of that principle to the practice in some of the States, has shortened that period to forty years.[3] The same principle applied to the statutes of other States, would reduce that period to even a less time. In Missouri, for example, the extreme limitation allowed to persons under disabilities for commencing an action, or making entry, is twenty-four years after the cause of such action or right of entry shall

[1] 1 Prest. Abst. Tit. 5, 246, 252.

[2] 3 Bl. Com. 196.

[3] The People v. Arnold, 4 N. Y. 508; The People v. Van Rensslear, 5 Seld. 291.

have accrued.[1] In all other cases the limitation is ten years.[2] It is essential, however, to the running of the statute, that the premises shall have been held in adverse possession during that time.

§ 18. **Title by Adverse Possession.**—Adverse possession for the period fixed by the statute is, in all of the States, in most respects, equivalent to a perfect title. And in some of the States such possession is an absolute legal title upon which ejectment may be maintained. In many cases to carry back the title beyond this point, is to invite tedious inquiry and long discussions. This is especially liable to be the result if the abstract should fall into the hands of an unwilling purchaser, or troublesome or timid counsel. On the other hand, in some of the States, the exceptions in the statutes in favor of persons under disabilities, such as infants, lunatics, prisoners, married women and persons beyond seas, introduce an element of uncertainty in point of time, against which there is no certain precaution except that of extending the search beyond the ordinary period of human life. And the existence of intermediate estates, deferring the claims of remainder-men, also suggest a like precaution in all of the States.[3]

§ 19. **Discretion to be Exercised by Abstractor.**—A discretion ought to be exercised by the abstractor not to disclose the title by the abstract beyond the common and ordinary rules of practice, either from mistaken candor, or from a still more culpable motive of extending the abstract for the purpose of increasing his fees. Nor yet to withhold any material information respecting the state of the title. Whenever a doubt exists, it is his duty to disclose all the deeds or other instruments which may raise the question, and to leave the purchaser's counsel to his own discretion in deciding for himself. It is presumed that in all ordinary cases, a title for forty years would be accepted as

[1] Rev. Stat. 1889, § 6767.
[2] *Ibid.* § 6764.
[3] Curwen Abst. Tit. § 30.

marketable in any of the States. In the western States, however, the general custom is to extend the abstract back to the original patent, and such a requirement is not unreasonable. In some cases, as will be further noticed, it is even advisable[1] to extend the inquiry into the title anterior to the patent.

[1] See Curwen Abst. Tit. 32.

CHAPTER IV.

PRELIMINARY INQUIRIES AND SKETCH.

SECTION.

§ 20. **Importance of Facts External to the Records.**—It is to be remembered that the title to real estate depends not only upon records and documents, but also upon facts external to the records. In commenting upon the usual method of examining titles, Judge COOLEY says: "A little reflection will convince us that these records cannot give all the information requisite; that it is entirely possible for perfect titles not to appear upon them at all, and that often they will indicate an indefeasible right in one who, in fact, has no title whatever. Indeed, in many cases, the nature of perfect titles is such that they cannot be spread upon the records, and in all cases there are important facts concerning which the record is silent, and which must necessarily be determined by extrinsic inquiries."[1]

§ 21, **Inquiry as to the Description of the Property.**—When called upon to prepare an abstract of title, a prudent abstractor endeavors, in the first place, to ascertain, by inquiry from his client, and from other sources, the exact location and boundaries of the property which is to form the subject of his investigations. Should the property con-

[1] Cooley's Bl. Com., Introductory p. xvii., note.

sist of any legal subdivision of a government survey, or of lots or blocks which have been regularly laid out and platted, as in the case of town or city property, the numbers and description of the land according to such survey or plat is all that will be required. But where the property consists in any irregular subdivision of a large tract, or is composed of several small tracts, or parts of tracts, or has been conveyed in general terms or by irregular descriptions, some previous knowledge of such facts and of the surrounding circumstances may be of great assistance in identifying and connecting the several descriptions contained in the different conveyances.

§ 22. **Inquiry as to the Title and Parties Through Whom it has Passed.**—The next inquiry, ordinarily, is in regard to the nature of the title to be deduced by the abstract, the degree of interest claimed, the name, age, character, condition, circumstances and place of residence of the present claimant, and of all former owners or claimants of the land. The object of these inquiries being to ascertain whether any of the conveyances are likely to be called in question for the reason that they were obtained from a person deprived of understanding; as an idiot, lunatic or the like; or from an infant or a married woman. Furthermore, a deed, though in due form, may be void, because it was obtained by fraud or duress; or because it was made for some illegal purpose, or contrary to some statute; or because it was made fraudulently to deceive, hinder or delay creditors; or because it was made in avoidance of the bankrupt or insolvent laws; or because it was misread to an illiterate, decrepit or ignorant person; or because it has been forged, or fraudulently altered in a material point by an interested party; or because it was executed by a person of the same name, but not the owner of the land. These and like considerations suggest the nature of the inquiries to be made in respect to the persons connected with the several transactions, and the importance of following up any suspicion that may be raised by the circumstances of

any particular transfer. Ordinarily, when there are no suspicious circumstances brought to light by such inquiries, the regularity of a transfer in these respects will be presumed.

§ 23. **As to the Possession of the Premises.**—The object, in the next place, is to ascertain what the connection of each of the parties was with the possession of the land during the period of their respective ownerships, and whether other parties have at any time been in possession, and if so, how long, and under what claim of right. In the prosecution of such inquiries, it will be remembered that adverse possession for the period fixed by the statute of limitations, is equivalent to a perfect legal title, and that, in some of the States, a deed made by one against whom the land conveyed is held adversely by claim of title, is inoperative to convey the legal title, as against one who has the actual seizin; and that, in many of the States, the open, visible and notorious possession of land operates as constructive notice of the rights and equities of the occupant, whatever they may be. Consequently, if any person other than the apparent owner should be found in the possession of the premises, inquiry must be made as to the nature of his possession, and as to his claim of right or title, care being taken to inform them of the pending contract of purchase.[1] The lease of a tenant should be inspected to ascertain whether it contains any unusual terms or covenants by which the purchaser would be bound.[2] All these inquiries may be of the utmost importance, as affecting the title to be deduced.

§ 24. **The Search for Transfers and Preliminary Sketch.**—Aided by whatever information he may have been able to obtain from his client, or from other sources external to the records, the searcher proceeds to make a preliminary sketch, consisting *first* of a plat of the land delineating the courses and distances of each line, the situation of the monuments called for, and the location of all

[1] Cov. Conv. Ev. 13, 19, 41.
[2] 1 Byth. Con. 101.

rights of way and other existing easements to which the land may be subject. And *next*, of the names of the grantors and grantees, with the dates of their respective deeds, the date of their filing for record, and the book and page where recorded, chronologically arranged. If the searcher is supplied with a skeleton abstract of the county records, or if there is a tract index, in which the conveyances and incumbrances are all indexed under the number of the tract or lot conveyed or affected, the labor of preparing a sketch of the conveyances and other records and documents affecting the title, will be very much simplified. According to the degree of confidence felt in such county abstracts or indexes, will be the reliance placed upon the sketch thus prepared. In many instances it will be necessary to search the alphabetical index of conveyances. When this is done, reference must be had to all the deeds made by every grantor up to the time of the present conveyance, and all these deeds are to be examined, and such as do not relate to the land in question stricken from the sketch. Circumstances will sometimes suggest the propriety of inquiring into the ownership of some of the lands purporting to have been conveyed, as such an inquiry might reveal the fact that a mistake had been made in the description of the premises, and that the land in question was intended—in which case equity will sometimes reform the deed and make it conform to the original intention and agreement of the parties. As in some of the States married women may pass title to their real estate without the concurrence of their husbands, searching in the husband's name alone may not be sufficient. Conveyances from the donee of a power should be searched for from the date of the creation of the power. In the case of a simple power of attorney, the principal is to be searched against, and not the attorney. In the case of deceased persons, the search should be extended down to the date of the next transfer and record of the deed from the heirs or executors, as the case may be, as a deed of incumbrance may have been re-

corded subsequent to the death of the deceased. It is always safest, in the case of executors or testamentary trustees, to search both against the executor or trustee and the deceased, and in the case of a trustee, against the beneficiary also. The method of indexing such conveyances is by no means uniform, and they may sometimes appear under the name of either party. It is necessary, also, to inquire whether there has been a change of testamentary or other trustees, as the case may be. The same observation with respect to the search being extended against all the parties will apply in many localities to sheriffs' and marshalls' sales, and sales for taxes. Though properly indexed in the name of the person whose title is supposed to be transferred, they are not infrequently indexed in the name of the officer executing the conveyance only. Wills are to be searched for in the office of probate. The search for incumbrances will be noticed in a future chapter.

In those States in which a deed takes effect, as against a subsequent purchaser, from the date of its being filed for record only, if no conveyance or incumbrance appears of record, it is generally safe to assume that none exist. Though, as often as any fact or circumstance may appear that would suggest an inquiry for any such unrecorded instrument, the inquiry thus suggested must be followed up, since whatever is sufficient to put a purchaser upon inquiry, is sufficient to charge him with notice of whatever an ordinarily diligent search would have disclosed, whether he actually made the search and ascertained the facts or not.[1] In some of the States the statutes provide that a deed recorded within a certain prescribed time after execution shall take effect, and be deemed valid from the time it was made, thus taking precedence over one made to an intermediate purchaser. The time thus allowed ranges in the different States from one year in some, down to five days in others.

[1] Martindale on Conv. (2d ed.), § 277; Acer v. Westcott, 46 N. Y. 384; Cambridge Valley Bank v. Delano, 48 N. Y. 326; Hamilton v. Nutt, 34 Conn. 501; Baker v. Mather, 25 Mich. 53.

Thus, in some of the States, a deed takes effect as against creditors, or subsequent purchasers without notice, from the date of record only; while in others the deed may be recorded within a certain time after its execution, some greater and others a less time, and the record takes effect by relation from the time when the deed was made. Among the States in which the record of a deed is constructive notice from the date of filing only, are Alabama, Arkansas, California, Connecticut, Colorado, Dakota, Florida, Illinois, Iowa, Kansas, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, Tennessee, Texas, Vermont, Virginia and Wisconsin.[1] In the District of Columbia, all deeds, except deeds of trust and mortgages, filed for record within six months from the date of acknowledgment, takes effect from the date of delivery, as to all persons.[2] In Delaware and Georgia, one year is allow for recording;[3] in Pennsylvania, Ohio and Maryland, six months;[4] In Mississippi, three months;[5] in

[1] Ala. Code, 1876, § 2149. But three months are allowed for recording "all conveyances, mortgages, and instruments in the nature of mortgages, to secure debts created at the dates thereof." *Ibid.*, § 2166; Ark. Dig. Stats., 1874, § 5025; Cal. Civil Code, 1874, § 1170; Conn. Gen. Stats., 1875, p. 353, § 11; Col. Gen. Laws, 1877, p. 139, § 17; Dakota Rev. Code, 1877, p. 341; Bush's Fla. Dig., 1872, p. 151, § 9; Ill. Rev. Stat., 1877, p. 277, § 30; Iowa Code, 1873, § 1941; Kan. Comp. Laws, 1879, § 1043; La. Rev. Stats., 1876, § 3081; Me. Rev. Stats., 1871, p. 560, § 8; Mass., Cushing v. Hurd, 4 Pick. 252, 256; Mich. Comp. Laws, 1871, § 4231; Minn. Stats. at Large, 1873, p. 639, § 21; Mo. Rev. Stats., 1879, § 691; Gen. Stats. Neb., 1873, p. 875, § 16; Gen. Stats. N. H., 1867, p. 252, § 4; Tenn. Stats., 1871, § 2072; Woodward v. Boro, Lea (Tenn.), 678; Tex. Rev. Stats., 1879, § 4299; Gen. Stats. Vt., 1870, p. 448, § 7; Va. Code, 1873, Tit. 33, ch. 117, § 2; Wis. Stats., 1871, ch. 86, § 27.

[2] Rev. Stats., 1873-4, p. 62. Deeds of trust and mortgages are notice from the date of filing only. *Ibid.*

[3] Ga. Code, pt. 2, § 2705; Del. Rev. Code, 1852, p. 269.

[4] Bright. Purd. Dig. Stats. Pa., 1873, p. 473, § 476; Ohio Rev. Stats., 1880, § 4134. Mortgages take effect only from the date of record, as to subsequent purchasers without notice. *Ibid.*, § 4133; Md. Rev. Code, 1878, art. 44, § 16.

[5] Miss. Rev. Code, 1871, § 2306. Mortgages are valid only from the date of deposit with the clerk for record. Claiborne v. Holmes, 51 Miss. 146.

Kentucky, sixty days;[1] in Indiana, forty-five days;[2] in New Jersey, fifteen days,[3] and Oregon five days.[4] In such States great care must be taken in making inquiry for unrecorded conveyances within the time thus prescribed.

It is to be remembered, also, that the date of the record of a deed has reference, as a general rule, to the time when it is deposited with the proper recording officer at the office of registration; and, therefore, the files of unrecorded instruments must be searched as well as the records proper. A prudent abstractor will always seek out and examine the original instruments when possible, even though recorded, since the deed itself may disclose defects or irregularities not apparent from the record, or it may have been improperly transcribed upon the record by reason of a portion being omitted. The question upon whom the loss shall fall if one is misled by relying upon a record which is incorrectly made, is one on which the cases are not all agreed. In some of the States it has been held that a deed duly executed, and left for record by the grantee, is to be deemed duly recorded so far as he is concerned, and is constructive notice to subsequent purchasers, incumbrances and creditors, notwithstanding errors in recording it.[5] But other courts have held that, if errors occur in recording, the record is notice only of what appears on its face.[6]

[1] Gen. Stats., 1879, ch. 24, § 14. Mortgages take effect only from the date of record. *Ibid.*, § 10. See also Finlay v. Spratt, 14 Ky. 225.

[2] Rev. Stats. Ind., 1887, p. 635, § 16.

[3] N. J. Revision, 1877, p. 155, § 14. And see Semon v. Terhun, 40 N. J. Eq. 364. The N. J. registry act does not apply to leases. Hutchinson v. Bramhall, 42 N. J. Eq. 372, reversing s. c. 40 N. J. Eq. 83.

[4] Fleschner v. Sumpton, 12 Oreg. 161.

[5] Kiser v. Heuston, 38 Ill. 252; Flowers v. Wilkes, 1 Swan. 408; Throckmorton v. Price, 28 Tex. 605; Merrick v. Wallace, 19 Ill. 486; Nichols v. Reynolds, 1 R. I. 30; Beverly v. Ellis, 1 Rand. (Va.) 102; Riggs v. Boylan, 4 Biss. 445; Oats v. Wall, 28 Ark. 244; Bank of Kentucky v. Haggin, 1 A. K. Marsh. 306; Polk v. Cosgrove, 4 Biss. 437; Lewis v. Hinman (Conn.), 13 Atl. Rep. 143. The record of a deed absolute in form but a mortgage in fact and recorded in the book of deeds, imparts notice of the grantee's interest as effectually as though it were recorded in the book of mortgages. Haseltine v. Espey, 13 Oreg. 301.

[6] Terrell v. Andrew County, 44 Mo. 309; Miller v. Bradford, 12 Iowa,

The Supreme Court of Michigan say: "The recording laws cannot be made by equitable construction, to embrace cases not within them, or to give constructive notice of things the records do not show; and where a mistake is made in recording, a subsequent purchaser has a right, in the absence of actual notice of the mistake, to rely on the records as showing the exact facts." [1] The Supreme Court of Missouri held that the obligation of giving the notice required by the statute rests upon the party holding the title, and if his duty is imperfectly performed, he, and not an innocent purchaser, must suffer the consequences.[2] But after a deed has been duly recorded, the partial or total destruction of the record book containing it does not affect the record as notice.[3]

14; Lally v. Holland, 1 Swan (Tenn.), 396; Sanger v. Craigue, 10 Vt. 555; Beekman v. Frost, 18 Johns. 544; Frost v. Beekman, 1 Johns. Ch. 299; Jennings v. Wood, 20 Ohio, 261; Willet v. Overton, 2 Root (Conn.), 338; Brydon v. Campbell, 40 Md. 331; Simon v. Kaliske, 1 Sweeny (N. Y.), 304; Payne v. Pavey, 29 La. Ann. 116; Potter v. Dooley, 55 Vt. 512.

[1] Barnard v. Campau, 29 Mich. 162.

[2] Terrell v. Andrew County, 44 Mo. 309.

[3] Martindale on Conveyancing (2d ed.), p. 266.

CHAPTER V.

CAPTION OF THE ABSTRACT.

SECTION.

§ 27. **Caption Should Contain What.**—The object of the caption is to definitely describe the subject-matter and scope of the examination. It should, therefore, set forth in as clear and concise manner as possible, a description of the property, the title to which forms the subject of investigation, or the object and the extent of the examination, as the case may be. For example, if it be a special examination for taxes, or for judgments against certain parties, the caption should so state, or if it be a continuation of a former abstract this fact should be indicated and the particulars as to the person making and the date of the former examination should be stated. Sometimes, as we have seen, the commencement of the abstract is taken by direction from a specified date, or from some former owner in whom the title is assumed to be good, which fact should in like manner be stated, as well as any other fact or circumstance limiting the extent of the search.

§ 28. **As to the Arrangement of the Abstract.**—The labor of perusing an abstract will be greatly facilitated if, in addition to furnishing information as to its contents, the caption also indicates the method of the arrangement.

Thus, when property is made up of different parcels which have been purchased at different times, and have ultimately centered in one person, each of the parcels should be distinctly set out and the time and manner in which they are connected shown, in such a way as to direct attention to the specific land to which each part of the abstract relates, so that every part may be read with due application to the subject. This mode should also be adopted as often as the title to be deduced is made up of different terms or estates in land, or where the property has vested in several persons as tenants in common, co-parceners, or joint tenants who have severed their tenancy, and there is a different deduction of title as to each. In such cases it is also proper to give a different head to the different parts of the abstract; and where two or more parcels or interests are united there should be a new head to direct attention to this fact. The head of the abstract should, of course, be varied in point of form as the circumstances of each case may require, directing attention to such facts as may be necessary to give a correct understanding of the circumstances attending the title to be deduced.

§ 29. **Index.**—Where the abstract is lengthy and complicated a brief table of contents or index will serve to indicate the arrangement and greatly facilitate the perusal.

§ 30. **Plats.**—In addition to the description of the premises in the caption, as above stated, it will frequently be conducive to an accurate understanding of the situation of the property, to preface the abstract with a map or plat designating its exact location and boundaries and the easements or servitudes, if any, to which it is subject. In the case of urban property it is usual to insert the map of subdivisions and additions in their chronological order, but maps of original surveys and all plats required to give a definite and accurate understanding of the extent and location of the property which forms the subject of the investigation are properly inserted at the commencement of the abstract.

CHAPTER VI.

GRANTS BY THE STATE OR GENERAL GOVERNMENT.

SECTION.

§ 33. **Modes of Passing Title to Public Lands.**—Various modes have been adopted by the several States, and by the United States in disposing of the public domain; such, for instance, as by public sale, private entry, homestead, pre-emption, etc., which it is not our purpose to consider. For, generally speaking, in whatever way the sale has been made, the patent is the evidence of title. "The patent is the foundation of title at law; and neither party can bring his entry before the court."[1] The title may be passed by Act of Congress in words of a present grant;[2] and a confirmation by law is to all intents and purposes a grant;[3] but in all these cases it is usual that a patent issues. Where no patent has issued, the question sometimes arises as to whether the title to certain lands has passed by grant. This, of course, depends upon the language of the grant. Two things are

[1] McArthur v. Browder, 4 Wheat. 488.

[2] Wilcox v. Jackson, 13 Pet. 498.

[3] Strother v. Lucas, 12 Pet. 410; Field v. Seabury, 19 How. 323, 333.

essential in order to pass the title by grant; *first*, it must appear that the intention was to pass a present title; and *second*, the land must be sufficiently described in order to be severed from the remainder of the public domain. Where the privilege of selection is given the grantee, it must appear that the selection has been made. Thus, where a railroad grant was of a certain number of sections of land on each side of the route of the proposed road, but the company had the privilege of location, this was held to be "a conditional grant *in presenti* in the nature of a float," and did not attach to any particular part of the public lands until the necessary determinative lines were fixed on the face of the earth.[1] The filing of a map of definite location in the Interior Department is *prima facie* evidence of selection, but may be overcome by actual proof of prior location.[2] Where lands are surveyed and marked out, the title of the State attaches to section sixteen for the use of schools, and if there be no legal impediment, becomes a good title.[3] In a case in which lands were reserved to a territory for the use of an institution of learning and duly located, it was held that the title vested in such institution when incorporated by the territorial legislature, and did not pass to the State upon its admission to the Union.[4] The act of September 28th 1850, granting swamp and overflowed lands to the State of Arkansas and other States, has been frequently held by the courts and by the Interior Department to be a grant *in presenti*, vesting an indefeasible legal title in the State to all swamp and overflowed lands, rendered thereby unfit for cultivation.[5] But more recently it has been decided and it is now regarded as settled that the fact that a tract of land was swamp on the 28th of September, 1850,

[1] 18 Opin. Atty.-Gen. 244.

[2] Railroad Co. v. Smith, 9 Wall. 95.

[3] Cooper v. Roberts, 11 How. 173.

[4] Vincennes Univ. v. Indiana, 14 How. 268.

[5] Railroad Co. v. Freemont County, 9 Wall. 87; Railroad Co. v. Smith, 9 Wall. 95; Clarkson v. Buchanan Co., 53 Mo. 563; Campbell v. Wortman, 58 Mo. 258; Wendell v. Conklin, Secy's Opinion, Nov. 11, 1873.

is not of itself sufficient to confer title upon the State or the county claiming by grant of the State. It is necessary in addition that it shall have been selected as swamp land, and the selection approved by the Secretary of the Interior, or if not approved, the tract must fall within the provisions of the Act of March 3, 1857, confirming swamp and overflowed land to the several States.[1]

§ 34. **What Law Governs.**—Generally speaking, the title to land can only be acquired or disposed of according to the laws of the State in which it is situated. But in the disposition of her public domain, the United States possesses the exclusive right to adopt such mode, and to convey by such instruments or title as the government may deem proper, independent of locality. In such cases the law of the United States is paramount to the law of the State; and the question whether the title has passed from the United States, is to be determined by the laws of the latter.[2] But as soon as the title has passed from the United States it takes the character of other property within the State, and becomes subject to State legislation.[3]

§ 35. **To whose Benefit a Patent Inures.** — A patent, as we have remarked, is a title from date, and conclusive against all those whose rights did not commence previous to its emanation. But when granted, a patent inures to the benefit of any one to whom the patentee is bound to convey the land, or for whose use he ought to hold it.[4] To a man and his "representatives" in a patent, means representatives by contract, as well as by operation of law.[5] Patents issued in the name of deceased persons are by statute made to inure to, and become vested in the heirs, devisees, or assigns of such deceased patentee, as if the

[1] Stephenson v. Stephenson, 71 Mo. 127.
[2] Irvine v. Marshall, 20 How. 558; Pratt v. Brown, 3 Wis. 603.
[3] Bagnell v. Broderick, 13 Pet. 436.
[4] Hennen v. Wood, 16 La. Ann. 263.
[5] Hogan v. Page, 2 Wall. 605.

patent had issued to the deceased person during his life.[1] But a patent issued in the name of a fictitious person, conveys no title to the land therein described.[2]

§ 36. **Patents Founded upon an Assigned Land Warrant.**—By act of Congress, June 3d, 1858, which was re-enacted by sec. 2444 of the Revised Statutes, military land warrants were declared to be personal property, and as such to be assignable by the warrantees, by their heirs, or devisees, or by the legal representatives of the deceased claimant, "for the use of the heirs only." Prior to this act, land warrants were regarded as real estate, consequently a transfer of a warrant before that date, by an administrator, must be accompanied by evidence that the same was made in pursuance of an order of court for the sale of the real estate of the decedent. In some States land warrants have been regarded as real estate in the settlement of estates in probate. In others they are regarded as personalty.[3] In Ohio and Virginia it was held that where one who was entitled to a patent died before it was issued, the right, unless devised, went to the heirs the same as other real estate.[4] In such case, the recital in the patent of an assignment of the certificate by the administrator of the enterer, may amount to notice of the want of authority to make the assignment, for *prima facie* he has by law no authority over the realty, and can only acquire such authority by order of court. An assignment of a certificate without such authority will not bind the heirs.[5] Where a patent is founded upon the assignment of a military right, a court of equity may inquire into an alleged fraud in the assignment, and if found fraudulent, decree the holder of the legal title to be a trustee for the equitable owner.[6]

[1] 3 U. S. Rev. Stat. ch. 11, § 2448.
[2] Thomas v. Wyatt, 25 Mo. 24.
[3] Moody v. Hutchinson, 44 Maine, 57.
[4] Brush v. Ware, 15 Pet. 93; Reeder v. Barr, 4 Ohio, 488.
[5] Reeder v. Barr, *supra;* Bell v. Duncan, 11 Ohio, 192.
[6] Brush v. Ware, 15 Pet. 93.

The Department of the Interior can afford no redress in such case, even though the assignment be forged.[1]

§ 37. **The Effect of a Patent upon Rights which Accrued Prior to its Emanation,** has been the subject of much discussion and seeming conflict of opinion. As a deduction from the authorities, we give the following general statement which we believe to embody the substance of the better opinions. The legal title remains in the United States until the patent has been issued; yet when an entry has been made and the land paid for, the purchaser has such an interest in the lands as will descend or may be aliened the same as other real estate. And the government can no more dispose of the land to another person than if the patent had been issued. The final certificate obtained upon payment of the money, is as binding on the government as the patent. A subsequent sale would be without authority of law and void. When the patent issues, it relates back to the entry, and perfects the title in any one to whom the patentee may have conveyed the land.[2]

§ 38. **Validity of Patents.** — The law presumes that every prerequisite has been complied with, and that the patent has been duly issued when it is found duly recorded in the record of patents.[3] But such presumption may be overcome by proof,[4] and the patent set aside by a court of competent jurisdiction on the ground of fraud.[5] A patent issued without authority of law, or contrary to law, is void, and a second patent issued upon legal authority will pass the title.[6] But a patent void for want of authority cannot be impeached by one resting on naked possession.[7] Individuals can resist the conclusiveness of a patent only by

[1] Opinion Secretary, Feb. 19, 1874.

[2] For a review of the cases, see 3 Washb. Real Prop. (4th ed.) 192, 199.

[3] Patterson v. Jenks, 2 Pet. 216.

[4] Lea v. Polk Co., 21 How. 493.

[5] Opin. Sec'y Int., Oct. 20, 1873.

[6] Opins. Atty. Genl. 7; Ross v. Borland, 1 Pet. 656.

[7] Sarpy v. Papin, 7 Mo. 503.

showing that it conflicts with prior rights vested in them.[1] Unless a patent was void upon its face, or was issued without authority of law, or against law, it cannot be impeached collaterally in a court of law. A third party in ejectment cannot raise the question of fraud.[2]

The statutory requirements for the execution of a patent must be strictly complied with. It has been held in some of the States that signing by the governor is not essential to the execution of a patent,[3] but such a precedent would be unsafe to rely upon. In a recent well considered case on the subject, Chief Justice WAITE said: "Each and every one of the integral parts of the execution, is essential to the perfection of a patent. They are of equal importance under the law, and one cannot be dispensed with more than another. Neither is directory, but all are mandatory. The question is not what, in the absence of statutory regulations, would constitute a valid grant, but what the statute requires; not what other statutes may prescribe, but what this does. Neither the signing nor the sealing, nor the countersigning, can be omitted, any more than the signing, or the sealing, or the acknowledgment, by the grantor, or the attestation by witnesses, when by statute such forms are prescribed for the execution of deeds by private parties for the conveyance of the land. It has never been doubted that in such cases the omission of any of the statutory requirements invalidates the deed. The legal title to lands connot be conveyed except in the form provided by law. * * * To be valid, a patent must be actually executed. Before it can operate as a grant, the last formality of the law, prescribed for its execution, must have been complied with. No provision is made for an equivalent for these formalities." [4]

To annul a patent, proceedings can only be taken by the

[1] Boggs v. Mersed Mining Co., 14 Cal. 316.
[2] Field v. Seabury, 19 How. 323.
The People v. Livingston, 8 Barb. 253.
McGarrahan v. Mining Co., 96 U. S. 316-322.

government, or by an individual in its name. The question is one exclusively between the government and the patentee.[1] Where the title has passed into the hands of an innocent purchaser from the patentee, it cannot afterwards be disturbed.

§ 39. **Registration Laws Do Not, Ordinarily, Apply to Patents** from the Government. They are authorized in most of the States to be recorded, but the reasons for recording them have not the same force as in the case of deeds. For if a patent is regular in form, and has been correctly issued and engrossed in the general land office, the title under it is perfect, the evidence is perpetuated by record, and there can be no subsequent purchaser without notice, even if it be not recorded in the county records. But it is important to know that this has all been done; and the only reliable evidence of that fact is the patent itself, or a certified copy of the record thereof. And one or the other ought to be required in every instance, as mistakes in patents are by no means uncommon.

The chief object in recording a patent in the office of the recorder of deeds in the county in which the land is situated, is to preserve this evidence for convenient reference, and for this purpose all patents should be so recorded. If a patent has never been delivered, it may be obtained by the person entitled to the same applying at the local land office of the district, or the general land office, to which the same may have been forwarded. If the patent has been lost or destroyed, an exemplification of it, which will answer every purpose of the original,[2] may be obtained by application to the commissioner of the general land office, upon payment of the fees, which is fifteen cents per hundred words for the amount of copying required, and one dollar for the commissioner's certificate.

[1] Field v. Seabury, 19 How. 332; Jackson v. Lawton, 10 Johns. 24; Moore v. Robbins, 96 U. S. 533-536.

[2] An exemplification of a patent, certified by the Commissioner of the General Land Office, may be received in evidence without proof of loss of the original. Barton v. Murrain, 27 Mo. 235.

§ 40. **Abstract of Patent.**—The points most important to be noticed in abstracting a patent are: 1. The date. 2. The name of the person to whom it was issued. 3. The words of heirship. 4. The recital of the payment of the purchase money. 5. The person to whom the payment was made. 6. The recital of any assignment by the certificate holder. 7. The description of the land. 8. The signing and sealing, and other formalities required by statute, if any. 9. The volume and page where the patent is recorded.

The reader is referred to the forms given at the close of the present work for an illustration of the method of abstracting the several instruments and records treated of, and which commonly evidence or affect title to lands.

CHAPTER VII.

ABSTRACT OF A PURCHASE DEED.

SECTION.

§ 43. **Introduction of the Instrument.**—It is usual in introducing a deed or other instrument to state what the general character of such instrument purports to be; as if it be a lease, mortgage, will, warranty or quitclaim deed. And also to state the date of the same.

Under this head it may be suggested that, in case of a single abstract, or an abstract consisting of a single chain of title, the deeds and other instruments of transfer should be abstracted in the order of their date. But in complex or compound abstracts, as where the property consists of several parcels, purchased at different times, and of different shares with different deductions of title to each, the arrange-

ment should keep the title to each share in a connected series as long as the title remains distinct.[1]

§ 44. **Names and Description of the Parties.**—In abstracting ancient deeds, when the possession has for many years been held under the title conveyed by them, it is not necessary to do more than state the names of the parties, without adding the places of their residence. But it is always proper to add the descriptive character in which they acted, since this description may afford at one glance an intimation of the character in which they conveyed, and connect the title with former parts of the abstract, or may lead to inquiry which will tend to elucidate the title. In case of modern conveyances it is proper and frequently essential to add the place of residence of the parties, and such other matter of description as the deed may contain, for the purpose of distinguishing them from other persons of the same name, or affording the information necessary to an inquiry as to any circumstance connected with them. This is more particularly important in reference to persons through whom a title must be derived, or by whom some act must be done with a view to rendering the title complete.[2]

Any irregularity in the names of the parties should be stated in the abstract; as where there are different initials given to the name in different parts of an instrument.

If the grantor be a corporation the name by which it presumes to grant should be carefully scrutinized; also whether such an act is within its corporate powers. For this purpose the charter must be examined. And if there proves to be any doubt regarding the power, the words expressing it should be stated in the abstract.

Particular attention should be paid to whether the wife joined in the conveyance so as to release her right of dower, or if the wife be the principal grantor, whether the husband joined. If there is no such record, this fact should put the

[1] See *Ante*, § 28.

[2] 1 Prest. Abstr. Tit., 53, 54.

abstractor upon inquiry to ascertain whether the grantor was single at the time of making the grant, and the result of such inquiry should be noted in some manner in the abstract. Extrinsic facts or circumstances of this character, directly affecting a conveyance, are properly stated in the form of explanatory notes to the abstract of the particular instrument affected. If not set out in the abstract, such facts and circumstances must be inquired into, and should be so noted by counsel examining the same.

§ 45. **Recitals in a Deed.**—Immaterial matter contained in the recitals of a deed should not be stated in the abstract. On the other hand, recitals which materially affect the history of the title should be fully expressed. The recitals generally deemed material to be introduced fully into the abstract are of former deeds, or incumbrances which are not recorded, and are not within the power of the vendor, descents, and other facts that fill up the parts of the chain of evidence which are wanting.[1] Where deeds of a modern date, and which are in existence, are referred to, it is proper that reference should be had to the deed itself, and the material parts of such deed set out. As notice of a deed is constructive notice of all it contains, it is right that the purchaser or the person on whose judgment he relies should have an opportunity of considering how far such deed affects his title.[2] As often as the deed recited has been introduced into a former part of the abstract, there should be a short reference to it, and this will be sufficient, except so far as the recitals, by averments or other means, disclose new and material information, when such additional facts should be given at large. So where a deed is made with reference to, and in exercise of a power, the words of reference should be stated. And where the grantors are trustees, it should be stated at whose request they made the grant; and if any particular mode of execution or attestation was prescribed to express such request, the clause by which it was expressed

[1] 1 Prest. Abst., Tit. 56.
[2] 1 Prest. Abst. Tit. 57.

should be fully set out. It is to be remembered, however, that what is done, and not what is said, is to be principally regarded; and it is material to show that these requisites were actually and duly observed. Facts which explain the deductions of the title, as often as they are recited, should be set out at large in the abstract. And, in modern transactions, although the history of the title may be regular, supposing the facts which are cited to be true, yet care should be taken that the purchaser may have, within his power, the means of giving evidence of these frequently most important circumstances of the title. In short, whatever tends to elucidate the title, either at law or in equity, or may show in what manner the purchase money ought to be applied, should be stated from the recitals, and such circumstances ought always to be supported, either by strong presumption or legal evidence of their existence.

§ 46. **The Consideration** should be stated in the abstract of every deed, either concisely or fully according to circumstances of the case. Where the grantor is the absolute owner, the consideration may be noticed very briefly. But as often as some trust or power requires that the money should be paid in a specific manner, that part of the deed which expresses the application should be detailed; and yet the statement without evidence would not prove the due application, unless the receipts of the trustees are to be discharges.[1] In these and the like cases, the language of the deed should be closely followed in the abstract. Also, when a deed is made in consideration of money payable out of a particular fund, as trust moneys, or the like, and a trust is implied from the mode in which the money is paid, or arises from the fund out of which it is taken, this circumstance should be stated. It is important that the nature and the amount of the consideration should be named in the abstract, not only because the recital of it is evidence of the amount which the grantee will be entitled to recover in case of eviction by a paramount title, but, as we have seen, it

[1] 1 Prest. Abst., Tit. 69.

may be such as to render inquiry necessary as to whether the deed is liable to be called in question by reason of the statute against fraudulent conveyances. Where a deed requires a consideration to support it, care should be taken that such consideration existed, and if the fact be not shown on the face of the deed, resort must be had to extraneous evidence.

§ 47. **The Receipt of Payment,** and by whom payment was made should be shown in the abstract, as the absence of such receipt may be notice of a resulting trust or lien for unpaid purchase money in favor of the grantor, or if paid by another than the grantee, a trust may be created in favor of the person who paid the consideration. Where it is the custom to indorse a receipt for the purchase money on the deed, it seems that the want of such indorsement is presumptive notice that the purchase money has not been paid, and raises a question of equitable lien in favor of the seller for his purchase money. This, however, is true only in respect to transactions of recent date. In titles depending on ancient deeds, when the possession has been enjoyed under the deed, the time which has elapsed, coupled with the undisturbed possession, furnishes the presumption that the purchase money was paid at the date of the deed.[1] In England payment will be presumed after the lapse of forty years.[2] It is presumed that under the statutes of all the States in this country a presumption of payment would arise in twenty-one years at most. The prevailing practice in this country, is to embody a receipt for the payment of the purchase money in the deed, immediately following the statement of the amount of the consideration. The delivery of a deed containing a clause of this character raises the presumption, in the absence of evidence to the contrary, that the consideration has been paid. And such clause should, therefore, be set out in the abstract. But it is unsafe for a purchaser to rely upon such a receipt where there

[1] 1 Prest. Abst. Tit. 71; 3 *Id.* 15.
[2] Dart. on Vendors, 300.

are any circumstances tending to raise his suspicion, or to put him upon inquiry in regard to the payment of the consideration.

§ 48. **The Granting Clause,** or operative words of a conveyance, should be fully set out in the abstract. All the words of grant should be introduced, even though some of them may appear redundant, and though of necessity all of them cannot be operative. This is especially important in those States in which certain words are made to imply certain express covenants, as some of the words used may be construed to limit the effect of others. And where the grant is in terms limited to the right, title and interest of the grantor, or any like expression follows the granting words, this should be fully stated in the abstract. It should also be shown whether all intended grantors and their wives are joined in the granting clause; and the abstract should also include a statement of the words of limitation to the grantee, his heirs and assigns. In most of the States, however, the word "heirs" is no longer necessary to create an estate of inheritance, in which States such words may, of course, be omitted.[1]

Where there are two or more grantees, if there are any words regulating the manner of their enjoyment, or indicating in what manner they shall hold, whether as joint tenants or tenants in common, these should be fully set out.

§ 49. **The Description of the Property.**—In abstracting the description of the property, where the description is short and uniformly the same in all the conveyances, or without any material alteration, there is, probably, no more eligible mode than to give the description at length at the head of the abstract only. But this is not convenient when

[1] Hawkins v. Chapman, 36 Md. 83; Cromwell v. Winchester, 2 Head, 389; Jordan v. McClure, 85 Pa. St. 496; Mackall v. Richards, 1 Mackay (D. C.), 444. But *contra*, Batcheler v. Whitaker, 88 N. C. 350. Where in a deed the words "children" and "heirs" are used indiscriminately in order to harmonize the two parts of the deed, the word "children" will be substituted for the word "heirs" in the *habendum*. Warn v. Brown, 102 Pa. St. 347. And see See v. Derr, 57 Mich. 369.

the description runs into great length; and it is inadmissible when it is different in different deeds. "The more general plan is to give the description at large in abstracting the first deed, and in the terms of description which occur in that deed; and in subsequent deeds to notice each variation, if any, which has taken place in any material part of the description."[1] And as often as any material change occurs in the manner of describing the premises the description should be set out in full in the language of the deed in which such change occurs. This is important in order that counsel may first determine whether the lands described in the particular deed to which his attention is immediately directed, are the same lands as comprised in the former deeds. If the identity does not sufficiently appear from the description contained in the conveyances, the facts should be authenticated by such extraneous evidence as would be admissible in explanation of the description, and such as would be sufficient to support the deed. Wherever other deeds, maps or surveys are referred to in the descriptive parts of a deed, the important parts of such deeds, maps or surveys should be set out in the abstract of the deed which refers to them. For the reason that such a reference has the effect to incorporate that which is referred to into the description, the same as if copied into the deed itself, and what is therein described will pass.[2] So where lands are conveyed by the numbers designated upon any plat, or survey, so much of such plat or survey as relates to the land in question constitutes a part of the description, and should be copied into the abstract.[3]

[1] 1 Prest. Abst. Tit. 81.

[2] City of Alton v. Ill. Trans. Co., 12 Ill. 38; Vance v. Fore, 24 Cal. 444; Boylston v. Carver, 11 Mass. 515, 517; Dippett v. Kelly, 46 Vt. 523; Allen v. Taft, 6 Gray, 552; Foss v. Crisp, 20 Pick. 121; Powers v. Jackson, 50 Cal. 429; Hudson v. Irwin, 50 Cal. 450. See Baxter v. Arnold, 114 Mass. 577; Walker v. Boynton, 120 Mass. 349; Sanborn v. Mueller (Minn.), 35 N. W. Rep. 666; Clamorgan v. Hornsby (Mo.), 6 S. W. Rep. 657; Cleveand v. Choate (Cal.), 18 Pac. Rep. 875. See also Martindale on Conv. (2d ed.), § 108.

[3] Dolde v. Vodicka, 49 Mo. 100.

§ 50. **The Habendum** should be carefully read and compared with the premises in the grant. If the latter contains the usual and sufficient words of limitation, and the *habendum* is in words the same, it need not be included in the abstract. But if the *habendum* is expressed in any other than the usual formal words, or if it varies in any respect from the terms of the grant, it should be noticed. The *habendum* is sometimes used to limit the use, or to declare to what use the party to whom the deed is made shall have the thing granted, and generally to limit the use to which the estate is held. Where so used, it should be fully set out in the abstract, as it may be important when no consideration is expressed or proved in preventing the use from resulting to the grantor. And as a deed by common law may be void because it limits an estate of freehold to commence *in futuro*, words which suspend the limitation or operation of the grant to commence at a future time should also be noticed. And where there are any words of modification severing the tenancy, or declaring in what manner the grantees shall hold, whether as joint tenants or tenants in common, these words should be added.

§ 51. **The Reddendum** may be abstracted very briefly, except where some particular reservation is made in some particular manner in which a question may be raised as to its validity, or where there may be doubts as to whether it may not create an exception, and where the reservation is the subject of the title to be considered. It should be remembered that to constitute a good *reddendum* the reservation must be to the grantor,[1] must be out of the estate granted,[2] and must be described in sufficient terms to afford

[1] Hornbeck v. Westbrook, 9 Johns. 74; Petition of Young, 11 R. I. 636; Bridger v. Pierson, 1 Laus. 481; Illinois R. R. Co. v. Indiana R. R. Co., 85 Ill. 211. But it may operate, when so intended by the parties, as an exception from the thing granted and as notice to the grantee of adverse claims as to the thing excepted and reserved. West Point Iron Co. v. Reymert, 45 N. Y. 703. And see Bridger v. Pierson, 45 N. Y. 601; Brossart v. Corlett, 27 Iowa, 288.

[2] Dyer v. Sanford, 9 Metc. 395.

some means of identification.[1] When these facts exist it will sufficiently appear by a simple statement of the reservation in as brief a manner as practicable.

§ 52. **Conditions, Limitations, etc.**—Conditions should be so abstracted as to show in what degree and to what extent they may operate, and by what modes they may be discharged or avoided. And if they have been performed or satisfied, the material circumstances should also be stated, so that an opinion could be formed as to whether the condition has been duly discharged. Sometimes it is useful and of great assistance in the perusal of the abstract to aver the fact that the contingency did or did not happen, as the case may be, thus: "It is further provided that in case of an event which did not happen, namely, if A. should die in the life-time of B.," then, etc., or, "In an event which did happen, namely," etc.

Provisions for forfeiture, re-entry and other special agreements should be set out more or less fully according to circumstances. The provisions contained in conditional clauses are so various as not to be capable of being reduced even to general rules, much less of being specified by particulars. Abstractors must necessarily exercise their own discretion in abstracting them according to the particular circumstances of each case. In general, it is safest and best to set out such clauses fully, or if abridged it should be done with great care. Abstracts, as a rule, are too concise in this particular.

§ 53. **Covenants for Title.**—The usual covenants in a deed are sufficiently stated in an abstract by naming them; thus, "with the usual covenants for seizin, right to convey, against incumbrances, of warranty," etc., and whether they

[1] Woodcock v. Estey, 43 Vt. 515; Jewett v. Ricker, 68 Me. 377. The same certainty of description is required in a reservation or exception out of a grant as in the grant itself; and when a deed reserves out of the conveyance one acre of land and there is nothing in the exception or evidence to locate it upon any particular part of the tract, the reservation is void for uncertainty and the grantee takes the entire tract. Mooney v. Cooledge, 30 Ark. 640. And see Martindale on Conv. (2d ed.), § 119.

extend generally "against all persons," or "the acts of the grantee and those claiming under him" only. When any of the usual covenants are expressed differently from the language in which they are ordinarily framed, such variation should be stated in the abstract. If unusual or special covenants are contained in a deed they should be fully expressed, so as to show their nature and extent. All burdensome covenants which may affect the purchaser, at law or in equity, should be stated in the abstract.

Where there are several parties to a deed it may be essential to state by and with whom the covenants are entered into, and what class of representatives are bound by them, so as to show whether they are real or personal covenants. It sometimes happens that the grantor covenants for his "heirs, executors and administrators," but fails to include himself, in which case it has been held that he is not bound.[1] Though if it appeared that the omission was a mere clerical error, it would doubtless generally be constructed to be binding upon him.[2] The use of blanks in the drawing of conveyances is very conducive to such mistakes, and the point should, therefore, be carefully guarded. Particular attention should also be shown to exceptions against incumbrances, and as often as they occur, together with the incumbrance thus noticed, so far as the same may be material to the title, they should be stated in the exact words of the covenants. It is to be remembered that the covenants are no part of the conveyance, however, and when they cease to exist or to be of any force as a personal obligation, either upon the maker or his privies by estate or by contract, they are of no consequence, unless they are such as create a charge upon the land.

§ 54. **The Testimonium Clause** is unimportant, except in those States in which the statutes provide that a scroll may be used in place of a seal, when such intention is ex-

[1] Traynor v. Palmer, 86 Ill. 477.
[2] Hilmert v. Christian, 29 Wis. 104.

pressed in the deed.[1] In such States this clause should always be noticed, and it should appear that it was the intention of the grantor to execute a sealed instrument. This may be set out in the abstract very briefly, however; as, "attest hands and seals."

In a few of the States it is usual, where the wife joins in the deed for the purpose of relinquishing her right of dower or homestead, to mention that fact in the *testimonium* clause. Where this is the practice, particular attention should be paid to this clause, and if any special form or expression is required for this purpose, sufficient should be stated in the abstract to show whether the law has been complied with. We have heretofore called attention to the importance of inquiring whether any such right exists where none appears to have been relinquished.

§ 55. **Signing, Sealing and Attestation by Witnesses.** —Some kind of a signature is now required by statute in all of the States. Generally any sign or mark intended by the grantor as his signature is sufficient. It should be made to appear in the abstract, however, that the instrument was signed by all the parties, and there is no more expedient method of setting this out than by copying the signatures as they appear in the instrument. It sometimes occurs that the signature is affixed by another person, in which case, as often as there is anything to suggest this fact, evidence should be furnished of proper authority, or that the grantor was present and directed the signing, or ratified the signature as his own. The fact that a signature has been made by another will be suggested by a mark being placed to the name, in which case the signature ought always to be witnessed by one or more subscribing witnesses. At least two would be preferable. Anything unusual in the mode of

[1] Frost v. Deering, 21 Me. 156; Davis v. Bartholomew, 3 Ind. 485; Fowler v. Shearer, 7 Mass. 14; Stinson v. Sumner, 9 Mass. 143; Stearns v. Swift, 8 Pick. 532; Witter v. Biscoe, 13 Ark. 422; Burge v. Smith, 27 N. H. 332; Learned v. Cutler, 18 Pick. 9; Martindale on Conv. (2d ed.), § 180.

signing shou.d put the abstractor on his guard, and it should be shown in the abstract.

In some States a seal is no longer required, but where the common law upon that subject is in force, it is essential to the operation of an instrument as a deed. In many of the States a scrawl has the effect of a seal when t appears to have been so intended. We have heretofore noticed the importance of observing whether or not the sealing is mentioned in the deed itself in such cases. Where the device intended as a seal is not so mentioned it should appear that it is sufficient as a common-law seal.

When the instrument is attested by subscribing witnesses this fact should appear, and in States in which such witnesses are required, tbeir absence should be noted. It is unnecessary to copy the attestation clause, unless it should contain something of a peculiar nature. In general, the word "attest," followed by the names of the witnesses, will be sufficient. The examiner should acquaint himself with the legal qualifications of such witnesses, and, as often as circumstances may suggest, should inquire into their competency.

§ 56. **The Acknowledgment,** to be effectual, must be in substantial compliance with the laws of the State in which the land is situated, in force at the date of taking the same. Abstractors and examiners of titles should, therefore, acquaint themselves, not only with the existing laws of their respective States upon this subject, but also with all revised or repealed laws providing what officers were authorized to take and certify acknowledgments and the requisites of the certificate. The date of the enactment and repeal of each provision should be firmly fixed in the mind, or noted in a convenient place for reference, in order that it may be determined whether the acknowledgment of each instrument comes within the law in force at its date. In many of the States statutes have been enacted which are designed to cure defects in acknowledg ments of deeds of ancient date. These should also be looked up and their effect carefully

weighed, the examiner being mindful of the fact that such statutes have sometimes been declared to be unconstitutional as affecting vested rights.[1] It should be remembered that with the exception in several of the States, of the deeds of married women, the acknowledgment is chiefly important in giving effect to the record as notice. It is not essential to the operation of the deed as a conveyance, and consequently becomes of less importance where the land has been held in actual possession under the title derived through the conveyance. A defect in an acknowledgment, therefore, may amount simply to a defect in proof which may be supplied *aliunde*.

Sufficient should be stated in the abstract of an acknowledgment to show that the statute under which it was taken and certified has been substantially complied with, if such is the case. In general, the following points should be noticed: (1.) It should appear that the act of taking and certifying the acknowledgment was performed within the jurisdiction of the officer taking the same.[2] Ordinarily, the venue is stated at the beginning of the certificate, by naming the State and county in which the act certified to was done. (2.) The time when the acknowledgment was made should be noted, chiefly as a precautionary measure for the detection of fraud. Should the date fall on Sunday it will suggest fraud or forgery, or may render the certificate void under the Sunday laws. The date of the acknowledgment may also become important as affecting the presumption as to the time when the instrument was delivered.[3] (3.) The name and official character of the officer taking the acknowledgment should be stated in the abstract, and if the jurisdiction within which he is appointed to act appears to be different from that mentioned in the caption of the certificate, this fact should be noted. The name of the officer should be given in order that it may be ascertained, if de-

[1] Logan v. Williams, 76 Ill. 175; Carpenter v. Dexter, 8 Wall. 513.
[2] Martindale on Conv. (2d ed.), § 257.
[3] *Ibi d.*, § 65.

sired, whether such person was acting in the official capacity stated or not, or whether he is a party to the deed, or so directly interested as to be disqualified from taking the acknowledgment. His official character should be stated for the additional purpose of determining whether such officer was authorized under the statute to take acknowledgments of such instruments. (4.) The averment that the parties appeared personally before the officer, the names of the parties appearing, and the fact that they were personally known to such officer, are important points to be noticed and set out in the abstract. If the identity of the parties has been proved, the substance of the proof and names of the witnesses should also be stated. (5.) The fact of the acknowledgment is the next important point to be noticed and set out in the abstract, and when any particular form of acknowledgment is required, as in the case of married women in several of the States, sufficient should be stated from the certificate to show a substantial compliance with the statute, or a want of such compliance if such is the case. When the private examination of the wife is required, it must ordinarily appear that she was made acquainted with the contents of the instrument, and examined separate and apart, that is, out of the hearing of her husband, and that she acknowledged the execution of the instrument for the purposes stated, freely and without fear, compulsion, or undue influence of her husband; and in some of the States she is required to state that she does not wish to retract. It is not essential that the exact language of the statute should be followed by the certificate, but it must appear that the statute has been substantially complied with.[1] Where the right relinquished is that of dower or homestead, this should ordinarily appear in the acknowledgment; in some of the States the mere acknowledgment that she executed the instrument would not be sufficient in such case.[2] In several of the States the custom is for the

[1] Martindale on Conv. (2d ed.), § 260.

[2] Martindale on Conv. (2d ed.), § 181, and cases cited.

release of dower and homestead to appear in the certificate of acknowledgment only, and in some others it has been expressly decided that it is not necessary that such a citation should appear in the body of the deed.[1] But in other States it has been held that such a release must appear both in the body of the deed and in the certificate of acknowledgment.[2] (6.) The certificate must be subscribed,[3] and where required by statute, it must be attested by the official seal of the officer making such certificate. The signature and seal, when there is one, should, therefore, be mentioned in the abstract. This may be done very briefly by any character or abbreviation that will be understood by the parties. When the official character of the officer taking the acknowledgment is certified to by any other officer, or where the instrument has been proved by subscribing witnesses, the substance of such certificate should be set out as above suggested.

§ 57. **Registration.**—The date on which the instrument was filed for record must be noted, and the volume and page where recorded. The latter is sometimes stated in the beginning, or in the margin of the abstract, for convenience of reference; but the writer has always found it equally as convenient to place these in their logical order, at the end of the instrument.

§ 58. **Memoranda.**—We have before stated that facts or circumstances extrinsic to the record, directly affecting

[1] As to homestead, see Babcock v. Hoey, 11 Iowa, 375; O'Brien v. Young, 15 Iowa, 5; Robbins v. Cookendorfer, 10 Bush, 629. But if it appears either in the deed or certificate of acknowledgment that the wife only released her dower, it will not be a waiver of the homestead. Wing v. Hayden, 10 Bush, 280.

[2] As to homestead, see Witter v. Biscoe, 13 Ark. 422; Russell v. Rumsey, 35 Ill. 362; Connor v. McMurray, 2 Allen, 202. And see Hoge v. Hollister, 2 Tenn. Ch. 606. As to dower, see Leavitt v. Lamprey, 13 Pick. 383; Catlin v. Ware, 9 Mass. 218; Stevens v. Owens, 25 Me. 94; Powell v. Monson, etc. Co., 3 Mason, 349; Hall v. Savage, 4 Mason, 273; Lufkin v. Curtis, 13 Mass. 223. See Lothrop v. Foster, 51 Me. 367; Westfall v. Lee, 7 Iowa, 12.

[3] The name of the officer in the body of the certificate is not sufficient. Marston v. Bradshaw, 18 Mich. 81.

any particular instrument, should be set out in the form of explanatory notes to the abstract of such instrument. Among the matters of this character may be mentioned the fact that the grantor was not in possession of the property at the time of the execution of the instrument, which in some of the States would render the deed invalid; and any fact or circumstance which would tend to show that the deed was fraudulent and void for any of the causes heretofore enumerated,[1] or the fact that the wife had not joined in the conveyance so as to release her right of dower. Or if there are interlineations or erasures upon any of the original deeds or upon the records, and not properly noted in the attestation clause or otherwise shown to lawfully constitute a part of the instrument, such fact should be shown; and additional evidence may be required by the purchaser as to the regularity of any such alteration.[2]

There are also various other facts and circumstances which connect the several transactions, and fill up the interim of title, proper to be noticed by way of explanation, when not set out in the recitals, and which should be mentioned in the chronological order in which they belong. Such facts, as we have before remarked, are frequently of the first and most essential importance to the title, and without their recital or averment the title would appear defective. Of this description are the facts of the death, or death and failure of issue of persons leaving prior estates, annuities, or such like incumbrances; the survivorship of one or more of several persons being either beneficial owners or trustees; also, the happening of any contingency by which one estate was to determine, and another take effect. In short, every circumstance which may shed any light on the state of the title, or help to account for the deduction of the same, ought to appear as part of the history of the title. It is further to be observed that every statement contained in the abstract should be supported by

[1] *Ante*, § 22.
[2] Greenl. Ev., § 564.

legal evidence, so far as possible, though a less degree of stringency in regard to the admissibility of the evidence is usually observed by counsel in the examination of titles, than by a court.

It is proper that facts which depend on extraneous circumstances should be authenticated by certificates, of baptism, burial, marriage, and the like, or by the affidavits of persons to whom facts are known, which do not admit of being verified in any other mode.[1] The method of abstracting a title dependent upon a descent, or a succession of descents from a remote ancestor, will be noticed in a future chapter.

[1] 1 Prest. Abst. Tit. 196.

CHAPTER VIII.

OF CONVEYANCES DEPENDENT UPON POWERS.

SECTION.

§ 60. **Of the Abstract of a Power of Attorney.**—In abstracting a power of attorney the abstractor will be guided by the object for which the power is given and its importance as affecting the title. Powers which have been exercised, or which are to be exercised with a view to complete the title, should be set out in the abstract almost *verbatim* as far as material to the title. But such powers as are barred, released, revoked or extinguished, or become incapable of taking effect, or are in their nature immaterial to the title, as powers of leasing, etc., need not be stated at large. It will be sufficient in such case to notice the power very briefly, stating the reasons why the same is deemed to be immaterial.

A complete abstract of a power of attorney will show at least the following facts and circumstances, as far as the same exist and are expressed in the power, *i. e.*, the names and description of the parties creating the power, and the person or persons by whom it is to be exercised; and, as often as it is to be exercised upon the consent or request of

a third person, or upon some condition, or the happening of an event, the mode in which such consent or request is to be expressed, or the condition or circumstances which are to attend its execution, should also appear. The acts authorized by the power should be fully set out, as if it be to sell, to execute deeds or mortgages, to relinquish dower, or to exchange for other lands, or do any other act in relation to the property. And the manner in which such acts are to be done, as if it be to sell for cash, or on credit, to convey with or without covenants and what covenants, if any, are authorized to be entered into, or if it be to exchange, whether for lands of equal or greater value, or for lands in a given locality, etc. If the power is to be exercised in favor of or in trust for another, this, and the manner in which the same is to be executed, should be fully set out. Also whether the power is to be revocable or irrevocable, and whether there is to be a power of substitution, and if so, how such power is to be exercised, and a full statement of the clause ratifying the acts performed, or to be performed by the agent, if there be such a clause.

As to the execution of a power of attorney it will be remembered that, as a general rule, where a statute prescribes certain formalities, and makes them requisite for the proper execution of an instrument, a power to make that instrument must be executed with like formalities,[1] and consequently, the execution, acknowledgment and other essentials to the due execution of the power, will be abstracted with the same care and in the same manner as in case of deeds.

Before taking title under a deed executed through an attorney, it will be necessary to ascertain that the power has not been revoked before the execution of the deed. A power of attorney is always revocable by the principal, whether it purports to be or not, unless given for a valuable consideration, or coupled with an interest.[2] But at common

[1] Clark v. Graham, 6 Wheat. 577.

[2] Brown v. Pforr, 38 Cal. 550; Hartley's Appeal, 53 Pa. St. 212.

law every power, beneficial or in trust, is irrevocable, unless an authority to revoke it is granted or reserved in the instrument itself.[1] In many of the States the statutes in respect to the settlement of decedents estates, prohibit the execution of a power within a certain time after the death of the principal, and in some of the States his death operates as a revocation of power even though it be coupled with an interest.

A power of attorney which in its nature is revocable, may be revoked either by the act of the principal or by operation of law. A conveyance of the same property or doing of the act authorized by the power, whatever it may be, by the principal himself, would, of course, put an end to the power, or it may be revoked by simply giving notice thereof. Generally, where the power of attorney has been recorded, an instrument revoking it will be required to be executed with similar formalities, and recorded in the same office in which the power is recorded, and notice or a copy of the instrument is also required to be served upon the attorney.[2] If no such notice is found of record it will generally be assumed that none has been given. But there are many other circumstances that may serve to revoke a power by operation of law, such as the death, bankruptcy, or after-occurring insanity of the principal, or the marriage of an unmarried woman, which necessitates inquiry extrinsic to the record, and evidence should always be required that no such fact existed.[3] This evidence may be dispensed with, however, where the power is thirty years old, and possession of the property has gone according to the deed under it for that period, the presumption arising in such case, without further evidence, that the power was valid and subsisting.[4]

[1] Story on Agency, § 477.

[2] Weile v. United States, 7 Ct. of Cl. 535.

[3] The rule of the common law that the death of the principal, whether known or unknown to the agent, terminates his authority, has been abrogated by statute in some of the States, among which may be mentioned Pennsylvania, where the authority of the agent does not cease until he receives notice of his principal's death. Purdon, 67.

[4] Cov. Conv. Ev. 37.

§ 61. **Of the Execution of a Conveyance by Attorney.**—In abstracting deeds executed by an attorney-in-fact, it is to be remembered that the power must be strictly pursued in such instrument, and, therefore, it should be made to appear in what manner the requirements of the power have been complied with. If any special requisites are prescribed by the power in the execution of the instrument, these must be strictly complied with, even though they may not be requisite under the general law to the due execution of a deed. It will, therefore, be necessary to examine the power and the instrument by which it is exercised with great care, and set out fully in the abstract the essential parts of both instruments. It is further to be remembered that in the execution of a power the agent is required, as a general rule, to act in the name of his principal and not his own name. This is true in respect to the ackowledgment, as well as the body of the deed; he should execute and acknowledge the instrument as the act and deed of his principal.[1] Special care should be taken in cases in which a married woman joins in the power for the purpose of authorizing the relinquishment of the right of dower or homestead. It may be a question worthy of consideration whether it is not essential that the power be specifically conferred upon the attorney in order to bar her rights, or whether she would be barred by signing the authority to convey.

§ 62. **Relinquishment of Dower by Power of Attorney.**—In several of the States it is provided by statute that: "A married woman may convey her real estate, or relinquish her dower in the real estate of her husband, by a power of attorney authorizing its conveyance, executed and acknowledged by her jointly with her husband, as deeds conveying real estate by them are required to be executed

[1] Ball v. Duntersville, 4 Term Rep. 313; Lovelace's Case, W. Jones, 268; Gardner v. Gardner, 5 Cush. 483; Hibblewhite v. McMorine, 6 M. & W. 200; King v. Longnor, 4 B. & Ad. 647; Frost v. Deering, 21 Me. 156; Videau v. Griffin, 21 Cal. 392; Burns v. Lynde, 6 Allen, 309, 310; Kime v. Brooks, 9 Ired. 219; McMurtry v. Brown, 6 Neb. 368.

and acknowledged."[1] In such States where the wife joins with her husband in executing a power to convey his land, she to relinquish her dower, authority to relinquish her dower should be conferred on the attorney in the body of the instrument, and the certificate of acknowledgment, where required, should show that, on a private examination, she acknowledged that she executed such power for the purpose of authorizing the attorney to relinquish her dower, instead of stating that "she relinquished her dower," as is frequently done where this form of acknowledgment is in use. The propriety, if not vital importance, of following this suggestion is apparent when we consider that no title passes to the attorney, and that, therefore, the dower cannot be released to him, but that the power can only authorize him to release it.

§ 63. **Powers of Sale in Mortgages and Deeds of Trust.**—In abstracting a mortgage or deed of trust containing a power of sale which has been exercised or which is to be exercised, whereby the instrument becomes a link in the chain of title, it is important to set out fully the terms upon which the power or trust is to arise, the manner in which it is to be exercised, and what notice is required to be given of the sale. A complete abstract of such instrument will embrace the following clauses:

1. The granting part, which corresponds to the premises of an ordinary deed and is abstracted in the same manner.

As often as there appears in this part of the instrument a recital of indebtedness and a covenant for its payment, this should be stated in the abstract, as such a covenant is often of importance as effecting the personal liability of the mortgagor, besides being the foundation of the trust upon which the power of sale is created.

2. The condition of defeasance provides, that if the mortgagor or those claiming under him, shall, within the time limited, pay to the mortgagee his executors, adminis-

[1] Rev. Stats. Mo. 1889, § 2397; Rev. Stats. Ill. 1877, Chap. 30, § 17; Stimson's Amer. Stat. § 6506.

trators or assigns, the debt secured, then the deed shall be void, or as sometimes expressed, the mortgagee will reconvey the premises to the mortgagor. The method of abstracting this clause, will depend somewhat upon the circumstances of the case and the purpose for which the abstract is made. If the intention is that the mortgage shall be discharged and the property relieved of the incumbrance, special attention will be paid to the clause providing who is to receive payment and enter a discharge. It will be remembered that, when payment is to be made to trustees, they must, as a rule, all join in the receipt and in entering the discharge, except such of them as have never acted and have renounced the trust. When the mortgage is to be foreclosed and the title under the mortgage is the subject of investigation, the time of payment of the debt or performance of the duty secured by the mortgage, should be clearly stated, in order that it may be determined with certainty whether a breach of the condition has occurred.

3. So the debt will be concisely or fully described as circumstances may suggest, and if there be any reason to doubt the existence or validity of the debt, this will call for extrinsic inquiry. Where the debt is not all due at the time the sale is made, or is proposed to be made, and there is a provision in the mortgage, that upon default in the payment of any installment, the whole shall become due and payable, this will of course be set out, as well as any other stipulations affecting the forfeiture or providing the event upon which the power of sale is to be exercised.

4. The clause providing upon what event the exercise of the power is to depend; by whom, and in what manner it is to be exercised; and what notice is required to be given prior to the sale, should be fully set out. It is especially important to notice to whom the power is limited in the event that it is to be exercised by an assignee, or any person other than the original donee. It is also important to note the place of sale and the particulars of the notice re-

quired to be given. The better plan is to copy into the abstract the clause containing these provisions, in the exact language of the instrument, or with such abbreviations or omissions only as the knowledge and experience of the abstractor has taught him that it is safe to make.

5. As often as there is a clause providing that the purchaser shall not be bound to inquire whether any default has occurred in the performance of the conditions of the mortgage, or whether notice has been given, or whether there has been any irregularity or impropriety in the sale, or that the recitals of the trustee shall be taken as *prima facie* evidence of the facts stated, this should be set out in the abstract.

So, a clause providing for the special application of a trust fund, requires to be noticed, in order that it may be determined whether it devolves upon the purchaser, to see to its proper application.[1] We have alluded elsewhere to the matter of seeing that the trustees have full power to give discharges upon receipt of the loan.

§ 64. **Of the Execution of a Power of Sale.**—Where title is derived through a sale made by a mortgagee or trustee, under a power contained in a mortgage or deed of trust, it must first be seen that the trustee had authority to make the sale, and secondly that this power was properly exercised. The authority of the trustee will depend first upon the language of the power. If the sale and conveyance is made by any person other than the original donee of the power, it must be seen that the power is so limited as to pass to such assignee or substituted trustees as the case may be; and for this purpose the nature of the assignment or method of the substitution must also be inquired into.[2]

It will be remembered that a trustee cannot delegate his duties to another, unless the instrument creating the trust

[1] See Martindale on Conv. (2d ed.), § 461.

[2] If assignees are included amongst the persons who may execute the power, an assignee, to acquire that right, must be the legal assignee of

clearly confers such power upon him.[1] And in all cases of the appointment of new trustees and a sale by them the power enabling the appointment will require attention and the mode of executing that power sometimes gives rise to questions of considerable nicety. When the sale is effected by substituted trustees, the words of the authority and the deed of substitution should be scrupulously regarded and carefully set out in the abstract. And in case of the appointment of a new trustee by a court of equity, the proceedings must be examined and abstracted in the same manner as other judicial prodeedings.

If the mortgagee or trustee was duly empowered to make the sale the next question to be determined will be in regard to the happening of the default or condition upon which the power or trust was to arise and whether the right of foreclosure has become barred by limitation or otherwise. These questions will depend upon a variety of circumstances as well as upon the language of the power, and must be determined according to the existing state of facts.[2] Where the power of sale in a mortgage or deed of trust provides that a purchaser at the mortgage sale shall not be bound to inquire whether any default has occurred in the performance of the conditions of the mortgage, or that the recitals of the mortgagee or trustee shall be taken as *prima facie* evidence of the facts stated, the duties of the examiner will be very much simplified, but it must appear that the purchase and sale was made in good faith without knowledge of irregularities or collusion on part of the purchaser.[3]

both the debt and the mortgage. A mere equitable assignee cannot execute the power. Martindale on Conv. (2d ed.), §§ 458, 510, and cases cited.

[1] Where a deed was to two persons, or the survivor of them, and to the heirs and *assigns* of the survivor, *held* that the surviving trustee could not substitute another to the powers conferred upon him by the deed of trust. Whittelsey v. Hughes, 39 Mo. 13; Titley v. Wolstenholme, 7 Beav. 425.

[2] For a discussion of the law on this subject, see Martindale on Conv. (2d ed.), §§ 496, 497.

[3] Jenkins v. Jones, 2 Giff. 99.

What notice of the sale is required to be given and the requisites of such notice are questions which depend entirely upon the language of the power and upon the statute of the State.[1] Where the requisites of the notice are prescribed by statute, its provisions must be complied with, whatever may be the terms of the power.[2] The power may, perhaps, impose additional restrictions upon the sale, but cannot take away those provided by the statute.

Sufficient should be set out in the abstract to show in what manner the above mentioned requisites have been complied with, and whether the sale was made in accordance with the notice and in pursuance of the power. A copy of the notice will ordinarily be required for this purpose, and the recitals of the deed setting forth the time and place and method of conducting the sale should also be copied into the abstract. If the sale was adjourned or postponed to a future date, the reason for the adjournment and the notice given thereof, should be inquired into and set out in the abstract.[3]

A mortgagee, as well as any other trustee, is bound to use all means in his power to get the best price for the property. He must, therefore, sell it as a whole or in parcels, according as it will bring the most money.[4] And must not impose unreasonable conditions upon the sale which would deter persons from attending and bidding.[5]

The capacity of the grantee to purchase and of the grantor to make the deed, must also be considered, as well as the formal requisites and execution of the instrument. In this connection it will be remembered that, unless authorized

[1] No notice is necessary unless made so by statute or by the power itself. Davey v. Durrant, 1 De. G. & J. 535. But where the power of sale is vested in a trustee it has been held that notice should be given to the mortgagor although the power is silent upon the subject. Anon, 6 Mad. 10; Lee on Abst. 141.

[2] Lawrence v. Farmer's Loan and Trust Co., 13 N. Y. 200, 642.

[3] As to what notice is required to be given of an adjournment, see Martindale on Conv. (2d. ed.), § 513.

[4] Wells v. Wells, 47 Barb. 416.

[5] Martindale on Conv. (2d ed.), § 513, and cases cited.

by statute, or the right is given him by the terms of the power, the mortgagee or trustee cannot become a purchaser at his own sale, either directly or indirectly.[1]

A mortgagee or trustee, being the holder of the legal title, must grant in his own name and not in the name of his principal, as in case of a simple power of attorney.[2] But where the power was to convey "as attorney" of the mortgagor, it was held that a deed made by the mortgagee in his own name would not pass the legal title.[3] Where the mortgagee is described as administrator, the deed is properly executed under the power, in his own name, since he cannot hold land in the capacity of administrator.[4] The ordinary clause of such a deed and the method of its execution, acknowledgment, etc., should of course, be abstracted in the same manner as any other deed.

§ 65. **Powers of Appointment.**—No title requires more care than one which depends upon the exercise of a power. Powers of appointment, in particular, frequently involve some of the most intricate problems in the law. They are less used in this country than in England. It is difficult to say that any other than a literal observance of the words of the power can be depended upon. They are so various as not to admit of being followed in detail here. Most powers, however, describe the persons by whom, the time at which, and the mode in which they are to be exercised, the estate to be appointed and the ceremonies which are to attend the execution of the power. The most eligible plan in abstracting such conveyances is to analyze the power, divide it into parts and collect the different circumstances required to its valid exercise, and to show in what manner

[1] Martindale on Conv. (2d ed.), § 514 and cases cited. Relief from such a sale would be afforded, even at considerable distance of time. Robertson v. Norris, 1 Griff. 421.

[2] Crawston v. Crane, 97 Mass. 459.

[3] Speer v. Hadduck, 31 Ill. 439.

[4] Wilkerson v. Allen, 67 Mo. 510.

these have been complied with in the instrument exercising the power.[1]

A deed made in pursuance of a power usually refers to the power and recites the substance of it, but this is not absolutely essential if it is otherwise manifest that the intention of the grantor was to execute the power.[2]

Where there is an interest and a power existing together in the same person, and a conveyance of the property is made without reference to the power a question of considerable nicety is sometimes raised as to what interest passes under the conveyance.[3]

[1] 2 Prest. Abst. Tit. 262.

[2] Lancashire v. Lancashire, 2 Phillips, 67; Kissam v. Dirkes, 49 N. Y. 62.

[3] See Jones v. Wood, 16 Pa. St. 25; Owen v. Ellis, 6 Mo. 77; Campbell v. Johnson, 65 Mo. 439; Towels v. Fisher, 77 N. C. 437.

CHAPTER IX.

AS TO THE ABSTRACT OF A DEVISE.

SECTION.

§ 67. **Unessential Parts of a Will.**—It was the opinion of some of the earlier conveyancers in England that a will should never be abstracted, but copied in full, "in order that counsel might have an opportunity of judging by the context as well as by the particular words of the devise or bequest." But, as suggested by Mr. Moore,[1] it is clear that all wills, both ancient and modern, may be more or less abridged without in the slightest degree perverting the sense of their subject-matter. Says this writer: "Modern wills for the most part, and ancient wills uniformly, contain a preamble dedicating the testator's soul to God; expressing the soundness of their minds; the health or debility of their bodies; the sentiments they possess of the goodness of Providence in giving them something to bestow; directing the place or manner of their interment; charging their relations or executors to observe or perform particular offices or duties towards their widows and children; directing

[1] Moore on Abst. 40.

the latter to be made wards in chancery, or appointing other guardians of them; giving small pecuniary legacies not charged upon the property mentioned in the abstract, and legacies of articles of household furniture, apparel, etc.; directing his debts to be paid at stated times; or some one or more of these objects; all of which, it must be confessed, have no necessary connection or relation to the subject of the abstract, and may therefore be safely omitted. And, again, the usual clauses for indemnifying trustees and executors; for appointing new ones; for revoking former wills, and other clauses, powers and trusts, which have not been acted upon and have not and cannot take effect, it is also submitted may be merely named or very briefly abstracted." Is should be borne in mind, however, that the power to sell land may sometimes be implied from the imposition of duties upon the executor which cannot be performed except by sale;[1] and where the executor, or executrix is the owner of a life estate and makes a conveyance, the question sometimes arises as to whether such conveyance operates under a power contained in the will to pass the entire estate, or merely conveys the life estate.[2] Great caution should, therefore, be exercised not to omit important matter, and the essential parts should be copiously given. It is better to err on the side of redundancy and transcribe those parts literally, especially the residuary clause and such as are in confused or dubious language, than to risk the consequences of curtailing them, unless their effect is clearly understood.

§ 68. **What May be Deemed Essential Parts of a Will.** —In considering the essential parts of a will it is not possible, as in case of deeds, to divide the subject with reference to formal parts of the instrument, since it cannot be said of the important parts of any will that they are matters of common form. The form of every will varies according to its subject-matter, the whims of the testator and

[1] Skinner v. Wood, 76 N. C. 109.
[2] Martindale on Conv. (2d ed.) § 155.

the skill of the draftsman. What may be deemed essential parts of the instrument depends entirely upon the manner in which it affects the property to which title is being deduced; for sometimes one part applies to it, and sometimes another.[1]

The points enumerated by Mr. Preston to be attended to are, "to show to whom the lands are devised; the words used in description of the lands; the words of limitation by which the estate is devised; the power, if any, in pursuance of which the devise is made; the words of modification, or of severance of the tenancy, if there be any; the words of qualification which may abridge or defeat the estate; the uses and trusts, if any are created; the conditions, or conditional limitations by way of executory devise, or otherwise, annexed to the devise or appointment; the charges imposed on the devisee; the indemnity, if any, against seeing to the application of the purchase money, or mortgage money; such powers, if any, as are material to the title; and when leasehold lands are the subject of the title, the appointment of executors."[2] In addition to the above, the abstract should, of course, show the date of the will; the method of its execution and attestation; the death of the testator and the probate and registration of the instrument. Charges for the payment of debts, legacies and annuities, and the enumeration of scheduled or specified debts may also be added to the list of clauses to which attention is to be paid.

§ 69. **Method of Abstracting the Important Clauses of a Will.**—In abstracting each of these clauses there should be a close adherence to the language of the will, so that a correct opinion may be formed of its construction.[3]

So the context of each important clause should appear as

[1] Moore Abst. Tit. 41.

[2] 1 Prest. Abst. 180.

[3] It will conduce greatly to accuracy and facilitate the perusal of the abstracts if the contents of documents are merely abridged without attempting to reduce the present to the past tense. 1 Sweets Jarm. Blythe, 91.

far as it may in anywise influence the construction by explaining, abridging or in any manner affecting the true import of the words. In such matters the abstractor should guard against conciseness and not diffuseness, especially where the language is not technical. In attempting to reduce the abstract to a narrow compass information which may be material is likely to be omitted. From the inaccuracies with which wills are frequently prepared and the lack of the regular form which is observed in deeds, it is often of the first importance to add all limitations over or clauses which affect the context, or vary the construction in any manner.[1]

§ 70. **The Several Clauses More Specifically Considered.**—It will be unnecessary to offer any comments upon the method of setting out the names of parties and description of the property as this subject has, perhaps, been sufficiently discussed under the head of deeds—a form will be found in the appendix.

Language which expresses a future use or estate, or which limits a contingent remainder, should be fully and faithfully abstracted, and the more special the words by which the limitation is introduced the more full and correct should be the statement of the words. And clauses which are expressed in a special manner, or in which the language is involved or ambiguous, require to be particularly detailed.[2]

Powers should be abstracted unless they are immaterial or become incapable of taking effect. They should show at least the following circumstances as far as they exist and are expressed:

1. The person or persons by whom the power is to be exercised.

2. The mode of exercising the power; as by deed, will, etc., and the circumstances which are to attend such execution.

3. The time at which the power is to be exercised.

[1] Prest. Abst. Tit. 181-182.

[2] *Ibid.* 104.

4. The consent or request which is essential to a valid execution of the power, and the mode in which such consent, request, etc., are to be expressed.

5. The act authorized by the power; as to sell or exchange, together with the circumstances connected with the mode of executing the power; as to sell for cash or to give time or to exchange for lands of a specified character.

6. The person or persons in whose favor the power is to be exercised; as children of the testator, or the children of a particular child, or objects of a given description, as children living at the death of the testator; and the estate which may be appointed to them, if any particular estate is mentioned in the power; also whether the power is to be executed revocably or irrevocably, or the like.[1]

The declaration of uses, if there be any, should be carefully set forth and exact words given together with all limitations.

Declarations of trusts should be fully stated, and if the trust be material to the title it should be shown that that which was directed to be done has either been duly performed or failed of effect, as the case may be. If the purchaser is bound to see to the proper application of the purchase money, the trusts directing the application should be set forth, or if it is provided that the trustees' receipts shall be good discharges for the purchase moneys and exonerate the purchaser or purchasers from the necessity of seeing to the application, and from liability for the misapplication or non-application of them, such provisions are material to the title and should be stated. The same observation will apply when property is sold for the payment of annuities, legacies, debts and the like.[2]

Says Mr. Preston: "When debts are scheduled or specified they should be disclosed by the abstract, but when there is a trust for the payment of debts or legacies, and the debts are not specified or scheduled, there exists no reason for

[1] Prest. Abst. Tit. 150.
[2] Moore Abst. Tit. 42.

stating the debts specifically, since the purchaser is under no obligation to see that they are paid. But if the debts become specified or scheduled by the act of any of the parties interested in the estate, or by the report of a court and they have not been properly satisfied, or the money applied under the direction of the court, there exists the necessity of treating these debts as scheduled, and they should be stated in the abstract, as the purchaser is bound to see to the application of the money."[1] And whenever any doubts are entertained as to the effect, operation, or exercise of any clauses, and particularly with respect to debts, legacies or annuities affecting the property, it is better to insert them at once than to risk the consequences of their omission.[2]

So codicils affecting the property to which the title is being deduced, should in like manner be set forth.[3]

In short, whatever may elucidate the title and show the rights or interests of the parties, the incumbrances, and the extent of them, are properly introduced into the abstract; and the more recent the proceedings the more important it is that their substance, and their material parts should be given in such a manner that their effect and influence on the title may be fully comprehended.[4]

§ 71. **As to the Signature and Attestation.**—The probate of a will, when not appealed from, vacated or set aside, is conclusive as to the validity of the will, so that in ordinary cases very little importance attaches to the method of its execution and this portion may, therefore, be abstracted very briefly. But where the attestation does not run in the usual phraseology, or there is any informality in the execution of the instrument, it should be fully set out to afford counsel an opportunity of judging whether any question is liable to arise upon it. Or where the time for appeal from the

[1] Prest. Abst. Tit. 180.
[2] Moore on Abst. Tit. 42.
[3] *Ibid.* 43.
[4] 1 Prest. Abst. Tit. 190.

probate of a will has not elapsed, the mode in which the will was executed should be fully and carefully abstracted. Other cases may arise also in which this will be of essential importance; as, for example, where the probate records show the death of the last owner and administrator commenced and abandoned or left unfinished, search should be made in the proper court to see if any will is there deposited or any probate has been entered upon and discontinued, and if any such will is found it should be fully abstracted. It should, in such case, appear whether the will upon its face shows compliance with all statutory provisions as to its execution. For this purpose it will be necessary to show whether the will purports to have been signed by the testator personally or by some person in his presence for him; at what part of the instrument the signature appears; the date of the signing; the attestation clause and signatures of the witnesses, with any peculiarities of execution noticeable. It will be advisable also in such cases to inquire into the competency of the witnesses, the capacity of the testator and any other facts *aliunde* which may bear upon the validity of the instrument. The formalities requisite to the execution of a will are prescribed by statute in all the States. These differ more or less in the different States, but the following essential ingredients generally enter into the execution of every valid devise: (1) It must be in writing. (2) It must be signed by the testator or some one for him at his request and in his presence. (3) It must be attested by two or more competent witnesses who must subscribe their names to the will in the presence of the testator.

What amounts to a sufficient signing by the testator has been a question of no little controversy. The statutes of some of the states require the signature to be at the end of the instrument;[1] but in many of the States this is not ex-

[1] California, Civil Code, § 1276; Kansas, Comp. Laws 1879, ch. 11, § 2; New York, Rev. Stat., 1875, vol. 3, p. 63, § 38; Pennsylvania, Brightly's

pressly required, and it has been held that a will commencing with the name of the testator, and written by himself, was properly signed, if it was his intention to adopt the writing of his name at the beginning of the will as his final signature thereto.[1] And proof may be admitted to show that it was the intention of the testator to adopt the name written by himself, or the draftsman in his presence, either at the commencement or in the body of the will, as his final signature.[2] But in the very nature of things the appropriate place for the signature is at the conclusion or foot of the will, and this seems to be contemplated by a statute which requires the will to be "signed." [3]

The testator may sign the will by writing his name, or by making his mark thereto, or, if he is physically unable to write without assistance, his hand may be guided by another, and it is not necessary that any express request should be made by him for such assistance.[4]

In Nevada and New Hampshire a will must be sealed;[5] but generally no seal is required.[6] In a majority of the States two or more witnesses are sufficient,[7] but in the

Purd. Dig., vol. 2, p. 1474, § 6; Stimson's Amer. Stat., § 2640; Kentucky, Jones v. Jones, 3 Metc. 168. As to what is a sufficient signing of a will "at the end thereof" within the statute, see McGuire v. Kerr, 2 Brad. 244; Hallowell v. Hallowell, 88 Ind. 251. A subscription to a will by the testator after the attestation clause meets the requirement of the statute requiring the subscription to be at the end of the will. Younger v. Duffie, 94 N. Y. 535.

[1] Catlett v. Catlett, 55 Mo. 330; Watts v. Pub. Adm., 4 Wend. 168; Sisters of Charity v. Kelly, 14 N. Y. Sup. Court, 290.

[2] 1 Redfield on Wills (4th ed.), 210; Reed v. Watson, 27 Ind. 443; Adams v. Field, 21 Vt. 256; Sarah Miles' Will, 4 Dana (Ky.), 1. See State v. Wilcox, 59 Mo. 176; 4 Kent Com. 631.

[3] Catlett v. Catlett, 55 Mo. 330. See Reed v. Watson, 27 Ind. 443; 1 Redfield on Wills, 212; Chase v. Kittredge, 11 Allen, 49.

[4] Vandruff v. Rinehart, 29 Pa. St. 232; Wilson v. Beddard, 12 Simons, 29; Van Hauswick v. Wiese, 44 Barb. 494; Cozzen's Will, 61 Pa. St. 196; Cool v. Buffum, 3 Oreg. 438. And see Main v. Ryder, 84 Pa. St. 217.

[5] Nevada, Comp. Laws, vol. 1, p. 200, § 3; New Hampshire, Gen. Stat. p. 357, § 6.

[6] Knapp v. Pattison, 2 Blackf. (Ind.) 355; Diez's Will, 50 N. Y. 88.

[7] Alabama, Code, 1876, § 2294; Arkansas, Dig., 1885, § 6492; Califor-

States below named the statutes require at least three witnesses.[1]

It may be that the will purports to be an olographic will —that is, all in the handwriting of the testator—in which case that fact should appear, as in some of the States such a will may be established by proof of the handwriting and signature of the testator, though there be no attesting witnesses. This is true in Arkansas, California, Kentucky, Mississippi, North Carolina, Pennsylvania, Tennessee, Texas, Virginia and West Virginia.[2]

§ 72. **The Probate of the Will** should be given in full if it be unusual either in form or substance, otherwise its main feature should be made to appear, viz., the date of

nia, Civil Code, § 1278; Dakota, Civil Code, § 691; Colorado, Stat. 1883, § 3492; Delaware, Laws, 1874, p. 508, § 3; Illinois, Rev. Stat. 1883, ch. 148, § 2; Indiana, Stat. 1881, § 2576; Iowa, Rev. Code, 1880, § 2326; Kansas, Comp. Laws, 1879, ch. 117, § 2; Kentucky, Gen. Stat. 1881, ch. 113, § 5; Michigan, Stat. 1882, § 5789; Minnesota, Stat. 1878, ch. 47, § 5; Mississippi, Rev. Code, 1880, ch. 46, § 1262; Missouri, Rev. Stat. 1879, § 3962; Montana, Laws 1872, p. 556, § 5; Nebraska, Comp. Stat. 1881, p. 227, § 127; Nevada, Comp. Laws, 1873, § 814; New Jersey, Rev. 1877, p. 1247, § 1; New York, Rev. Stat. pt. 2, ch. 6, art. 1, § 40; North Carolina, Code, 1883, § 2136; Ohio, Stat. 1880, vol. 2, § 5916; Oregon, Gen. Laws, 1872, p. 788, § 4; Rhode Island, Pub. Stat. 1882, ch. 182, § 4; Tennessee, Code, 1884, § 3003; Texas, Rev. Stat. 1879, p. 712, § 4859; Virginia, Code, 1873, p. 910, § 4; Wisconsin, Rev. Stat. 1878, ch. 103, § 2282. In Pennsylvania a will is required to be proved by two witnesses, but these are not required to be subscribing witnesses. Bright. Purd. Dig. 1872, ch. 171, § 4.

[1] Connecticut, Gen. Stat. 1875, p. 369, § 2; Florida, Dig. 1881, ch. 200, § 1; Georgia, Code, 1882, § 2414; Maine, Rev. Stat 1883, ch. 74, § 1; Maryland, Rev. Code, 1878, art. 49, § 4; Massachusetts, Pub. Stat. 1882, ch. 127, § 1; New Hampshire, Gen. Laws, 1878, ch 193, § 6; South Carolina, Gen. Stat. 1882, § 1854; Vermont, Rev. Laws, 1880, § 2042.

[2] Arkansas, Dig. 1884, § 6492; California, Civil Code, § 6277. And see Billings' Estate, 64 Cal. 427; Kentucky, Gen. Stat. 1881, ch. 113, § 5. And see Toebbe v. Williams, 80 Ky. 661; Mississippi, Rev. Code, 1880, ch. 46, § 1262; North Carolina Code, 1883, § 2136; Pennsylvania, Purd. Dig. 1872, ch. 171, § 4. And see Fosselman v. Elder, 98 Pa. St. 159; Tennessee, Code 1884, § 3004; Texas, Rev. Stat. 1879, p. 712, § 4860; Virginia, Code 1873, p. 910, § 4; West Virginia, Code 1882, ch. 84, § 3. But in two States (Tennessee and North Carolina), it is not good unless found among the valuable papers and effects of the deceased or lodged in the house of another for safe-keeping.

the judgment or order; the date of proof of the will; before what court the probate was made; the name and office of the person signing the judgment or order, admitting the will; whether the seal of the court is affixed; and whether or not it purports to have been made in term time.

It often happens that there is some defect of jurisdiction in the court admitting the will to probate arising out of the facts that all of the persons interested in the estate were not properly served and consequently not before the court and, therefore, not concluded by the action. It is, therefore, imperative that the abstract should give all the facts upon which the jurisdiction depends. These facts are the filing of the petition for probate, with a summary of its contents, especially the persons named therein as interested in the estate; whether the petition was verified, and when and by whom, and when it was presented to and filed by the ordinary or judge; the order for hearing made therein, and when and by whom made, and the date set for such hearing; who and what persons were served, by what kind of service (whether personally or by publication and if the latter the number and dates of such publication) and the proof of such service filed; who, if anyone, appeared at the hearing; whether any contest was made and if so by whom; whether any of the persons interested were minors, designating such as had not attained majority and whether guardians *ad litem* were appointed for them or any of them.

After the question of jurisdiction has been passed the abstract should show whether any appeal had been taken from the probate, and if so to what court, and whether the appeal is still pending; if not, the final disposition thereof, with the date of such final disposition.

It next should be made to appear whether the executor or executors named in the will accepted the trust or renounced, and if the latter who was appointed administrator with the will annexed and the fact and date of his qualification.

§ 73. **Registration, and herein of Foreign Wills.**— The statutes of the States generally provide that all wills by which the title to real estate is affected, shall, with a certificate of probate attached, be recorded in the office of the Recorder or Register of Deeds of the county in which the land affected is situated. And that wills within this category, proved in foreign States may be recorded with like effect when properly authenticated. And in most of the States (if not all), such foreign will may, when so authenticated, be filed in the proper Probate Court, and a hearing had thereon to test the jurisdiction of the foreign court before which the will was so proved, and to determine whether the judgment is still in force.[1] Whereupon, the jurisdiction being found, the will may be recorded with like effect as to passing title to realty, with wills proved within the jurisdiction where the land affected lies. This is also the effect of the record of such authenticated wills, so recorded, which have not passed through the local court, provided, the jurisdiction of the foreign court, and the life of the judgment are assured. The method of authentication in such cases is made uniform throughout the States and Territories by act of Congress, and the provision specifying the mode in which such authentication shall be made is found in Revised Stat. of U. S. Sec. 905.[2]

In abstracting the record of any will, whether proved at home or abroad, all the points suggested in the preceding section should be regarded, and furthermore, the certificate of the proof of the will should be carefully scanned, and all peculiarities thereof noted. The date of the certifi-

[1] See Martindale on Conveyancing (2d ed.) § 558.

[2] As the U. S. Statutes may not be accessible to all, we give that portion of the section referred to, bearing upon the subject under consideration. "The records and judicial proceedings of the court of any State or Territory, or of any such country (*i. e.*, any country subject to the jurisdiction of the U. S.) shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice or presiding magistrate that the said attestation is in due form."

cate, the name and office of the person making the same, and the presence or absence of the court or officer, should in all cases appear. In the case of foreign wills, where the proceedings upon the probate are inaccessible, the abstract should set forth specifically the substance of the certificate of probate, and must also show how, and by whom and when the authentication was made, and must carefully note any departure from the method of authentication pointed out by the section cited from the United States Statute.

CHAPTER X.

JUDICIAL SALES AND DECREES.

SECTION.

§ 76. **Judicial Sales and Decrees Defined.**—A judicial sale, as the term is here used, is a sale made by the court through the instrumentality of one of its officers, in pursuance of a judgment, order or decree which indicates the specific property to be sold. The expression is used in contradistinction from sales made by an officer of the court upon a writ, as of *fieri facias*, issued against the debtor personally, and requiring satisfaction out of his property generally, or any part thereof, which may be seized for that purpose. Judicial sales, strictly speaking, embrace: 1. Those made in chancery. 2. Those made by executors, administrators and guardians. 3. All other cases where property is sold under an order or decree of court designating such property and authorizing its sale.[1]

[1] Freeman on Void Jud. Sales (3d ed.), § 1.

Of the class to be considered in this chapter are sales upon foreclosure of mortgages and other specific liens by order or decree of a Court of Chancery and upon judgments of partition and orders in probate proceedings.

The judicial decrees considered are those which by their own force and without the intervention of any sale fix or transfer the title to real property; as, for example, decrees of strict foreclosure, decrees construing devises, or decrees in chancery divesting and investing title.

The chief portion of the discussion will apply both to such sales and decrees, since, up to the rendition of the judgment, the points requiring attention from the abstractor are identical.

§ 77. **Of Jurisdiction in General.**—The first point to be considered in abstracting either a judicial sale or a decree, is the jurisdiction of the court rendering the judgment, or making the order upon which the sale or transfer is based. Without jurisdiction the judgment or order together with all subsequent sales or proceedings based thereon are absolutely void, and will support no claim.

Before any court can render any valid judgment or make any valid order, it must have:

First. Jurisdiction of the subject-matter of the cause or proceeding.

Second. Jurisdiction of the persons who are parties to the cause, and who are to be bound by the judgment or decree; and,

Third. The court must have before it and proceed upon a complaint, bill, petition or other equivalent which states a cause of action; that is, states facts which if taken as true, warrant the relief asked.

§ 78. **Jurisdiction of the Subject-matter** must always be vested in the particular court rendering the judgment, and no waiver of the parties can confer this, nor can their express consent.[1] Thus if the statutue of a State governing the settlement and distribution of the estates of de-

[1] Dicks v. Hatch, 10 Iowa, 388; Moore v. Ellis, 18 Mich. 77.

ceased persons makes no provision concerning the estates of persons who died prior to the passage of such statute, then an attempt to administer on one of the last named estates is a usurpation of authority over a subject-matter not within the jurisdiction of the court, and the proceedings are therefore invalid.[1] So if a probate court should make an order for the sale of property situated in another State, this would also be an assumption of authority over a subject-matter not within the jurisdiction of the court and therefore void.[2]

The abstract should show all the facts disclosed by the record, at least, bearing upon this point. It should, therefore, commence with the name and locality of the court and a statement of the object of the action, with a reference to the record of the instrument involved, if the cause of action be matter of record.

If the abstract is intended to be used in a distant State it is expedient to show the character of the court, as well as its title; that is, whether it be a court of general or of inferior or limited jurisdiction, since the names of the courts vary in different States, and the mere title of the court might not convey a correct idea of its character to an attorney examining the abstract in another State.

It is important to note the locality of the court for the reason that, as a general rule, jurisdiction depends upon the location of the property within the county or district which defines the jurisdiction of the court acting. But exceptional cases are numerous, in which it will be found that the court rendering the judgment sits in a distant county. This may happen as the result of a change of the venue or a removal of the cause. Where this is the case, the name of the court where the action was originally brought should

[1] Danner v. Smith, 24 Cal. 114; Coppinger v. Rice, 33 Cal. 408; Adams v. Norris, 23 How. 353; Tevis v. Pitcher, 10 Cal. 465; McNeil v. First, 66 Cal. 105.

[2] Salmond v. Price, 13 Ohio, 368; Watts v. Waddle, 6 Pet. 389; Latimer v. R. R. Co., 43 Mo. 105.

also be given, and the abstract should further show the date and grounds of the change of venue or removal, and on whose application it was had. Or the court rendering the judgment may sit in a county other than that in which the land in question is located, for the reason that lands situated in different counties are embraced in the same proceeding. Where this is the case the fact should be noted, with the fact that the action was brought in the county or district where a portion of the property affected lies. And if the statute require that the action shall be brought in the county in which the greater portion of the estate lies, or in which the defendant resides, the facts which confer jurisdiction in the case should be set forth in the abstract.

If the court be one of competent jurisdiction and the property is situated within its jurisdictional limits, or if the circumstances exist which authorize the court under the law to take jurisdiction thereof, the next inquiry is, did the court proceed properly to take jurisdiction of the subject-matter and of the particular case? This will be found to depend, usually, upon the service of notice or other method of acquiring jurisdiction of the person, and upon the bill, petition or other statement of the cause of action, each of which will be considered in separate sections.

§ 79. **Jurisdiction of the Person.** — Following the name of the court and the venue in which the action was brought it is usual to set out the names of the parties, plaintiff and defendant, and it is most convenient to note here the manner in which jurisdiction was obtained of the parties. If new parties have been added in the progress of the suit their names should also appear here, as well as in the order in which they appear in the proceedings, to which reference may be had. This is expedient in order that it may be seen whether the necessary parties are all in court before proceeding to the next inquiry.

The filing of the complaint or petition gives jurisdiction of the petitioner, being his appearance. But the record

must show and, therefore, the abstract should indicate whether and how the defendants, or those having interests adverse to the petitioner or petitioners, have been brought before the court—they being deemed unwilling parties.

Jurisdiction of such persons can be conferred only by the service of process in some manner prescribed by the laws governing the tribunal, or by consent, that is, by appearance generally in the cause. If the defendants are of sufficient capacity, that is to say, if by reason of maturity and mental ability they are competent to act for themselves and they appear generally in the cause, jurisdiction of their persons is thereby acquired and it is unnecessary to inquire into the manner in which they were served with process or whether they were served at all.

But frequently the judgment or order passes by default, without any appearance on the part of the defendants, or some of the defendants are minors or lunatics and consequently not capable of appearing. In such cases, and they are very numerous, the abstractor must examine carefully the process which assumes to bring them into court, the method of its service upon the defendants, and the proof of such service appearing from the record. In many of the States, if a married woman is a party her husband must be joined with her, unless the suit is between husband and wife, in which cases she must appear by her next friend. Sometimes it will appear that one or more of the defendants has not been served. This fact should be made to appear in the abstract, since the defendants not served, although named in the judgment, are in no way bound or concluded by it, or by any proceedings based upon it.

The simplest method of service is personal and will be evidenced by the certificate or return of the officer, or by affidavit, if the service was made by a private citizen. In the first case the abstract should state that the service was personal and made by the proper officer, designating him. But even here the return should be inspected to see if it is correct and complete, and the substance of the certificate

set out in the abstract. In the latter case, the affidavit should be looked at to ascertain that it complies with the statute and that the service was made by a person not a party to the action, if the law so requires, and one not otherwise disqualified; and these facts should be made to appear in the abstract. Any irregularity in the return or affidavit should, of course, be noted.

If the process was served by leaving it at the residence of the defendant, care must be taken to see that the return or affidavit sets out the existence of the fact making such service admissible that is, that the defendant could not be found, and further shows that every step prescribed by statute in making such service was taken. Any lack of these requisites, and any departure from the mode of service pointed out by statute, should be noted.

Where minors, lunatics, or other persons not *sui juris*, are defendants, the slightest departure from the mode of service indicated by the statute must be given on the abstract. Where guardians are appointed for any parties the appointment and acceptance of the guardian should appear.

In courts of general jurisdiction, the process or summons is frequently served on absent defendants by publication, and in probate courts this is the common method of notifying the adverse parties. Such a mode of service is made possible only by reason of some statute, and depends upon the statute, so that any departure from the method pointed out in the enactment or the absence of any step there prescribed is fatal to the service, and consequently jurisdiction never attaches. Before such a mode of service can be resorted to, it is, in most of the States, required that the complaint or bill shall be filed. The abstract should, therefore, show the fact and date of such filing. Next, any order of court necessary to authorize such service. The abstract should show the fact that such an order was made, its date, by what officer it was made, and the manner of service enjoined by the order itself. This may be by service without the State, or by publication for a specified

time, or by both such service and publication. In the case of such service without the State, the abstract should show by whose affidavit such service is evidenced, and when and where and how such service was made; and in case of publication, the abstract should show the first and last date of such publication, with the name of the newspaper publishing the same, and capacity of the person making the affidavit to such publication, whether printer, or foreman, or publisher. All these points are particularly essential in cases of default. The abstractor will not be called upon to go beyond the record, however, since jurisdiction of the person usually depends upon the proof of service before the court, and not upon the fact of service.

§ 80. **The Bill, Complaint or Petition** upon which alone the court can act and which sets its machinery in motion must state facts which would authorize the court to take jurisdiction of the case. That is, it must state a cause of action so as to be sufficient upon general demurrer.[1] It should, therefore, be so abstracted as to disclose every material allegation. In this the abstractor must of necessity be governed by the peculiar circumstances of each case. Ordinarily, where he can rely upon his skill to give the contents with accuracy, it will be sufficient to set forth briefly the facts alleged, including the description of the property and the prayer of the petitioner. It may be remarked that jurisdiction does not depend upon any single or specific averment. For instance, in equity practice the averment that the acts complained of are contrary to equity and tend to the injury of plaintiff, and that he has no remedy, or not a complete remedy, without the assistance of a court of equity, is called the jurisdictional clause;[2] but if it appear from the bill that the court has jurisdiction, the bill will be

[1] Whiting v. Porter, 23 Ill 445; Gibson v. Roll, 30 Ill. 173; Goudy v. Hall, *Id.* 109; Johnson v. Johnson, *Id.* 215; Morse v. Gould, 11 N. Y. 281; Jackson v. Babcock, 16 N. Y. 246; Smiley v. Sampson, 1 Neb. 56, 70; Mason v. Messinger, 17 Iowa, 268; Alabama Conference v. Price's Ex'rs., 42 Ala. 49.

[2] Mitford Eq. Plead. (Jeremy Ed.) 43.

sustained without this clause, and if the court has no jurisdiction the bill will not be sustained though the clause be inserted.[1] It may, therefore, be safely omitted from the abstract.

§ 81. **Other Jurisdictional Inquiries.**—There are certain other points coming within the foregoing divisions and bearing on the question of jurisdiction, which should receive attention at the hands of the examiner, which will be referred to briefly. The judge who assumes to act, may have been disqualified to sit in the cause, either by reason of interest or by some other circumstances, in which case his acts are invalid. In such case, if the disqualification appears from any part of the record, it should be set out in the abstract, or if from extrinsic sources the existence of any such disqualification is suggested or comes to the knowledge of the abstractor the fact should be noted.

Again, jurisdiction of the cause or proceeding may have been once acquired and afterwards lost. Administration may have been revoked, or after administration granted a will of decedent may have been found and probated. The judgment or order may have been suspended, vacated or reversed by writ of *certiorari*, or error, or by appeal, or the proceedings may have been enjoined. In all cases where a court is rendered incompetent to proceed, its proceedings, during such incompetency, are as invalid as though it had never possessed jurisdiction.[2] It is the duty of the abstractor to search for any such acts or proceedings, and to indicate the same fully.

§ 82. **Of Probate Proceedings and Sales Therein.**—In an ordinary suit in equity or action at law, if the complaint discloses a cause which the court was competent to entertain, and the record shows jurisdiction over the persons of the defendants, it is generally safe to forego further inquiry upon the subject of jurisdiction, unless some special circumstance arises to suggest it. But in probate proceedings juris-

[1] Story Eq. Plead., § 34.
[2] Freeman on Judgments, § 121.

dictional inquiries are material at almost every step, and to be inattentive to them is rash imprudence.[1] It was, therefore, thought proper to add an additional section more specifically devoted to such proceedings.

In order that a Probate Court may obtain jurisdition of the subject-matter of the estate itself, every step prescribed by the statute must be strictly followed, and if the court fails for any reason to obtain jurisdiction of the estate in the first instance every subsequent sale or proceeding in the matter, even though it may be regular in itself, will be absolutely void.[2] These courts proceed *in rem* and the *res* is the estate of the decedent or other subject and the provisions of law in regard to the existence and establishment of certain facts and the giving of certain notice are conditions precedent to the exercise of any jurisdiction over the estate.[3]

The first requisite to jurisdiction of the estate of an alleged decedent, is the fact of the death of the testator or intestate. If the supposed decedent be not in fact dead, all proceedings had on his estate, and all sales therein are void.[4]

If the death is a matter of notoriety, it will be sufficient to state the fact in the abstract, with the date of the decease. Frequently, however, administration is granted upon evidence which is not conclusive of death, as for instance, upon proof of unexplained absence for the period of seven years. In such case the abstract should disclose the kind of proof, as the jurisdiction and consequently the validity of the proceedings depends upon the fact of death and not upon the assumption or finding of the court.

Again, it must appear, and the abstract should show, either that the decedent was a denizen at the time of his death of the county in which administration was had, or that he left

[1] Freeman's Void Judicial Sales, § 9.
[2] Chase v. Ross, 36 Wis. 267.
[3] *Ibid;* Garey's Probate Laws, § 27.
[4] Melia v. Simmons, 45 Wis. 334.

in that county property subject to administration, and that the application for administration discloses these facts. If the administration is merely ancillary to the principal administration in another State, the abstract should show the grounds on which application for such administration is based.

Again, before jurisdiction of the general subject-matter of the estate is acquired, the statutory notice must be given; and the abstract must show the kind of notice ordered by the court, the manner in which such notice was given (whether personally or by publication), and the proof of such notice, and if the notice was by publication, the first and last dates of such publication.

The abstract should then show the date and substance of the order for letters of administration, the date of the issuance of the letters, and of the qualification of the administrator. These remarks apply as well to testate as to intestate estates, and to executors as well as to administrators. In the case of an administrator, it should further appear that the one appointed was the first entitled to letters, or that the right of such person or persons has been waived.

Before the sale or order to be considered has been made, a vacancy may have occurred in the office of administrator or executor, and an administrator *de bonis non*, or an administrator *cum testamento annexo de bonis non* may have been appointed. Here the same points must be looked to and noted as at the beginning of administration, with the addition that it must appear that a legal vacancy in the office existed, and that there remained estate subject to administration. Consequently the application for such subsequent administration must disclose, and the abstract should show these facts. For if they do not exist, or are not made to appear to the court, any step taken in such subsequent proceedings is void.[1]

[1] Sitzman v. Pacquette, 13 Wis. 325; Matthews Adm'r v. Douthitt, 27 Ala. 273.

In probate proceedings the grounds set out in the petition and upon which the action of the court is demanded, should be briefly stated in the abstract. We have seen, *supra*, that the existence of certain facts is necessary to the acquisition of jurisdiction of the estate. But not only must the facts exist, but they must be properly alleged in the petition for administration. Otherwise, as far as the proceeding is concerned, it is the same as though the facts did not exist.[1]

An example may be found in the case of an application by an administrator for license to sell lands to pay debts of the deceased. The statute requiring as a condition precedent the existence of certain facts (stated below), the petition must allege their existence, and the abstract should show that the petition was properly made and verified and set out the amount of the personal estate which came to the hands of the administrator; the amount remaining undisposed of; the amount of debts outstanding against the deceased; a description of real estate of which the intestate died seized; its condition and value by parcels; and the names of the heirs, designating those which are minors; the substance of which should be set fully forth.

§ 83. **The Judgment, Order or Decree** should be given in substance in the abstract; not indeed at length, but sufficiently to show its scope and effect. There should be given:

1. The term of court at which the judgment purports to have been rendered, or if signed in vacation, that fact.

2. The date at which the judgment was entered.

3. The place on the minutes of court or judgment book where it is recorded.

4. A condensation of the mandatory part of the decree. If it be the ordinary judgment of foreclosure of mortgage, it will be sufficient to state that fact, giving the amount due and costs to be made by the sale, stating whether the judgment is for an installment only, or for the

[1] Broom's Leg. Max., 163.

whole debt, what officer is directed to make the sale, whether the sale is required to be made in parcels, and if so, the order in which the parcels are to be sold. If in any part of the record it is discovered that a portion of the premises constitute the homestead of any defendant, it should be noted, as should any other particular not common to all such decrees.

If the decree be in partition, enough of the substance of the mandatory portion of the judgment should be given to convey clearly to counsel the act of the court, and what has been ordered, with the manner indicated for the execution of the sale. In the same manner any other order or decree requiring a sale should be presented on the abstract, except that where the statute prescribes the form of the order, as is generally the case in probate proceedings, and the order conforms to the statute, a simple statement of the latter fact and of the ruling ordered will suffice.

Decrees which of their own force fix, divest or change the title, should be given more fully, and the safest plan will be to give the mandatory clause or clauses affecting the property in question, divested only of the superfluous wording and repititions.

Care must be taken to see that the description of the land in the judgment or order corresponds with the description in the complaint or petition, and any discrepancy should be noted.

If the decree requires that it be recorded with the Register of Deeds before it shall operate as a transfer of title, the fact or omission of such registry should be given. The registration of the decree is essential in some States to charge subsequent purchasers with notice, and in other States a decree not recorded within a specified time becomes a nullity.

§ 84. **The Sale** following the decree or order should, of course, be made in precisely the manner and with the formalities required and pointed out by the decree and the law governing such matters. Certain departures from the pre-

cise mode and the omission of certain of the steps prescribed would be treated as irregularities merely and would not necessarily vitiate the sale, while other departures and omissions would render it invalid. Indeed the courts of the various States are not in harmony with each other on this subject, and the Federal decisions on this proposition are at variance with many made by the State courts [1] It would not be in accordance with the plan of this work to enter upon a discussion of the questions involved, even if any satisfactory conclusion could be reached. The only safe plan for an abstractor is to note upon the abstract every step taken in making and completing the sale, and show every departure from the requirements of the decree and the law, leaving it for the purchaser's counsel to determine the effect of such departure by the circumstances of the case, and by the local statutes and decisions of the State.

In the first place it should appear, in proceedings in probate or orphan's courts, that the additional oath and bond, required of the administrator, executor or guardian, has been taken, given and filed, with the respective dates and the penalty of the bond. Next, if a preliminary appraisement of the land is required and made, it should be noted with the valuation fixed by the appraisers. The manner in which notice of the sale was given, together with the time such notice was given (giving dates of publication) and the evidence of the giving of such notice should be made to appear, with the time and place fixed by such notice for the sale. If the sale was adjourned from time to time, the abstract should show the time when and the date and place to which such adjournment was made, the reasons assigned for the same, the subsequent notice given, if any, and the proof on file touching such adjournment. It should further appear who made the sale, and in what capacity he acted, the place and time of making the sale, the amount bid, the name of the purchaser, and if it can be ascertained whether the purchaser had any interest in the proceedings which

[1] See Freeman's Void Jud. Sales (3d ed.), § 21.

would disqualify him from bidding at the sale. The abstract should show not only the day on which the sale took place but also the hour of the day, and the manner in which the sale was conducted, whether by auction or otherwise. It must also appear whether the land was sold in parcels or not, and if sold in parcels, the order in which the tracts were sold and the amount realized for each piece.

§ 85. **The Report of Sale** should set forth most if not all of the above particulars, but the abstractor should not be content with presenting a condensation of the report alone, if anything in the proceedings as evidenced by the records or files contradicts its statements, or indeed if any fact affecting the regularity of the sale comes to his knowledge from extrinsic sources. The report, however, should appear both by its contents, date and filing, although if it merely recites the facts covered by the preceding section, there will of course be no necessity for repeating them. Any omission or evasion, or irregularity in the report should be carefully noted.

§ 86. **The Sale Must be Confirmed** by the court before the title passes, although a subsequent confirmation relates back to, and carries the title as from the date of the sale. If the law requires that notice of the motion for confirmation be given to the defendants or parties in interest, the fact, manner and time of giving such notice should appear on the abstract. The order of confirmation should be set out in the abstract in a manner similar to that suggested for abstracting decrees—it being in effect a decree in itself. Matters before set out in the abstract, as to contents, need not be repeated, but should be merely referred to, while the dates, and the term at which the order is made, and entered should be carefully and exactly given. The same care should be taken as in the abstracting decrees to note whether any proceedings have been had vacating or reversing the order of confirmation.

§ 87. **The Deed upon a Judicial Sale** should be abstracted generally in the manner pointed out in Chapter VII.

(*ante*), and especial attention should be given to the recitals. The execution and acknowledgment of the deed should be looked to, in order that it may appear whether the execution and acknowledgment purport to be made in the official or individual capacity of the officer or person making the conveyance.

CHAPTER XI.

EXECUTION SALES.

SECTION.

§ 91. **Definition.**—The precise line of distinction between judicial and execution sales is not always clearly defined, and in the different States there are many actions partaking partly of the nature of both, so that it may be difficult, in some cases, to determine to which class a given action belongs. We apprehend, however, that this is of no great importance, as a rule, to the examiner of titles, as the legality of every proceeding will depend chiefly upon the local laws governing the tribunal.

It will be assumed as a general definition that an execution sale is one made by the executive officer of a court, by virtue and in pursuance of a writ which commands satisfaction of the judgment of the court out of the property

generally of the judgment debtor. The direction to the officer, ordinarily, being to make the sum specified out of the personal property of the debtor, and in failure of chattels, out of his real estate. Sometimes where an attachment has at the outset of the action, or pending the litigation, been levied upon real property of the defendant, or where the judgment is for improvements and like cases, the execution directs the sale of the property in question, or of the debtor's interest therein, and thus makes such realty the primary fund for the payment of the judgment.[1]

It must be remembered that many judgments will support an execution sale, although recovery of money was not the primary object of the suit. In such category are judgments in ejectment, where recovery of mesne profits, or for betterments, may be had in the same action; judgments for deficiency in suits for foreclosure of mortgages; decrees in which damages are awarded; and generally all judgments in which costs are taxed and inserted. Sales upon any such judgments may, generally, be classed under the head of execution sales.

§ 92. **Preliminary Suggestions.**—In abstracting a conveyance by execution sale, the first thing to be looked to, as in case of a judicial sale, is the jurisdiction of the court rendering the judgment; and the abstract should show all the steps preliminary to judgment in the same manner, as indicated in the foregoing chapter, keeping in mind the provisions of the statute providing the method of acquiring jurisdiction of the parties and of the particular case. Another question to be primarily considered in the examination of an execution sale is, whether the property in question is subject to sale upon execution. This, however, will generally depend upon the nature of the estate or interest sold or attempted to be sold, and will be for counsel to determine in the perusal of the abstract. But any fact bearing upon this question, which may come to the notice of the abstractor and which does not otherwise appear in the abstract should be noted.

[1] Swift v. Agnes, 33 Wis. 228.

such as the occupation of the premises by the judgment debtor as a homestead, or any other fact which under the law would exempt the property from such sale.

§ 93. **Attachment.**—As suggested in the preceding section, the real estate in question may have been levied upon by attachment, either at the outset of the action or at some time before judgment. Everything concerning such levy is essential, as a sale under execution issued in such action transfers not only the interest which the judgment debtor had in the premises at the time of docketing the judgment, but also carries all the interest he had therein at the time of the levy of the attachment and any interest that he may have acquired between such levy and the levy of the final writ.

The provisions authorizing attachments are purely statutory and, therefore, differ in detail in the various States. But it is uniformly held that the conditions prescribed by statute, both as to the preliminaries to the issuance of the writ, and as to its execution, must be strictly observed, in order to make the levy good. Hence it is essential, especially where the property under consideration changed hands pending the action and after the levy of the attachment, that every step taken toward the issuance of the attachment, as well as every step taken in executing it, should be given in detail. Thus, the affidavit made to obtain the writ should be carefully abstracted, and even the phraseology of the cause alleged for issuing the process should be given *verbatim*. The substance of the bond or undertaking accompanying it is also necessary, with the names and justification of the sureties, as are also the contents of the writ itself. This latter should be given particularly as to its date, sealing, signing, etc.

Next, the return on the attachment is to be given fully enough to show everything which has been done in executing it.

There should also appear a minute of the filing and recording of the writ or certified copy thereof with the Register of Deeds, where this is required by statute.

Frequently judgments are rendered where no personal service has been obtained and the action is commenced by the attachment of real estate and publication of the summons. To such cases the foregoing remarks apply with special force, since the levy of the attachment is essential to jurisdiction. The facts showing service by publication should be fully given as suggested in regard to judicial sales.[1] Judgments recovered on such service affect only the land levied upon by attachment, or, at most, property of the debtor within the State. On such service no personal judgment can rest.

§ 94. **The Judgment.**—Every execution must be based on a judgment properly rendered and entered by a court of competent jurisdiction, and to authorize a sale such further steps must be taken as are required to constitute the judgment a lien upon the property to be sold. While in some of the States the lien of the judgment attaches from the date of its rendition, in others it attaches only from its entry, and in others still it is the docketing of the judgment by the clerk of the court, in a book kept for that purpose, which gives the lien that is enforced by the execution. The abstract should, therefore, show not only the term of court and date of the rendition of judgment, but also the entry upon the judgment docket. If rendered in vacation the abstract should also show the date, by whom signed, and the date and proofs if entered by the clerk in vacation. If the judgment was entered upon *cognovit* or warrant of attorney, in addition to the above items, the warrant should be abstracted with the statement or affidavit on which it was entered, and the name of the attorney appearing for the defendant and of the judge signing the judgment roll or order for judgment should be given. In every instance the damages and costs adjudged should be given separately.

If the judgment was originally rendered by a Justice of the Peace, the original record in the office of the Justice, or

[1] *Ante*, § 79.

his successor, should be carefully scrutinized, when accessible, and when not, the transcript filed in the court above, or in the office of the Clerk or Recorder of Deeds, as the case may be; and the abstract should show particularly every point bearing on the question of jurisdiction. It should show fully the method and proof of service; the cause of action and amount claimed; every adjournment of the case, specifying the time and place to which the action was continued, and the cause shown for such continuance; how the action was tried, whether by jury or not; the date of the trial and the date of the entry of judgment, as well as the day and hour of the docketing of the transcript and the volume and page of the docket where it appears.

Further, the abstractor must ascertain whether the judgment has ever been suspended, stayed or reversed; whether any writ of error or *certiorari*, or any appeal has been taken, and whether the collection of the judgment has ever been enjoined. If any such contingency has happened the abstract should show the present condition of the given proceeding.

If the judgment was rendered in a county other than that in which the land is situated, it must, in some States, be docketed in the latter county before any sale can be made upon it in such county. In other States execution may issue to any county; in some of which a certificate is required to be filed in the office of the Recorder of Deeds. In others the writ is entered upon a "foreign execution docket" in the office of the sheriff; while in others the lien attaches from the date of the levy only.

§ 95. **The Execution** must be carefully looked to, in order that it may appear that it is sufficient in substance, and issued by the proper person, at a proper time, and conforms substantially to the judgment. After the lapse of a certain period fixed by statute, from the rendition of the judgment, execution can issue only upon an order of the court. Therefore, the date of the issuance of the execution must be given. It must appear also whether any exe-

cution had been previously issued upon the judgment, and if so, its date should be given and when and how it was returned. If the death of the defendant, or either of them, has occurred after judgment, or any change taken place in the ownership of the judgment, this fact should be noted and the proceedings had in relation thereto fully set forth. If the time prescribed by statute within which an execution may be issued without leave of court has elapsed, then the abstract should show the affidavits or petition on which leave to issue the writ has been given; also the date and substance of the order granting such leave, and the name and capacity of the judge or officers signing the order.

The substance of the writ should be given in order that it may appear that the execution, both in its contents and indorsement, describes the judgment accurately as to the amount for which it was rendered, the dates of its rendition and docketing, and the amount remaining due. The presence of the seal of the proper court should also be noted. Its omission has been held fatal.[1]

In the case of a *venditioni exponas*, directing a sheriff to sell lands specifically described, a brief description or reference to the lands should also be included.

The indorsements upon the writ, though perhaps not always of vital importance,[2] should, nevertheless, be substantially set out in the abstract, including the date of its reception by the sheriff, the levy and the return. This is especially important in case of foreign executions where the lien dates from its receipt by the sheriff, or from the levy, as the case may be. And where such executions are required to be recorded or docketed, a minute thereof should also be made.

§ 96. **Claims of Exemptions.**—It is, of course, indispensable that the property sold should be subject to the execution levied upon it. If any portion of the premises sold

[1] Ins. Co. v. Hallock, 6 Wall. 556.

[2] The authorities are divided with respect to the necessity of a levy. Freeman on Executions, § 264.

has been claimed by the debtor or other person as exempt, on the ground that it was a homestead, or that the land did not belong to defendant, the proceeding had thereon should be fully set out.

§ 97. **Inquisition or Appraisement.**—In some of the States the statutes require an inquisition or appraisement of real estate prior to its sale upon execution. Sales made in violation of this provision are usually, but not universally, held void.[1] Where this law obtains, therefore, the abstract should show in what manner the requirements of the statute have been complied with.[2]

§ 98. **Notice of the Sale.**—Some notice of the time and place of sale, and of the property to be sold, is universally required by statute to be given. Courts have not always held such notice to be absolutely essential to the validity of the sale, but it has been so held in some of the States,[3] and the proper course for an abstractor under either ruling is to set out the notice in the abstract, together with the proof of the posting and publication thereof. The abstract should contain a brief synopsis of the contents of the notice and of the proof of publication. Where printed or written notices are required to be posted in certain places, this proof will consist of the return of the officer or affidavit of the person posting the same indorsed or attached to a copy of such notice, and when notice has been published in a newspaper, proof of the publication thereof is generally required to be furnished by the affidavit of the publisher or printer of the newspaper. The abstract should show: 1. By whom this affidavit was made. 2. How he describes himself, whether as printer, publisher or otherwise, and whether such description of himself is a part of the affidavit or is mere recital. 3. The date and substance of the affidavit and especially the date of the first and last publication.

[1] Freeman on Void Judicial Sales (3d ed.), § 27.
[2] Herman on Executions, § 197.
[3] Hughes v. Watt, 26 Ark. 228; Lafferty v. Conn, 3 Sneed, 221.

§ 99. **The Sale.**—It should be made to appear: 1. By whom the sale was made. 2. In what manner it was made, whether at public auction or private sale. 3. At what time the sale took place, giving the day and hour. 4. The place where the sale occurred, and 5. Whether the property was sold *en masse* or in parcels. And in some of the States it should further appear what sum was designed to be realized by the sale; as a sale to raise a sum greater than that authorized by the judgment would be void.[1] The evidence of the facts and circumstances above enumerated, although of more or less importance, is seldom preserved with any degree of care, and it is fortunate for purchasers that the law generally supplies by presumption that which is wanting in proof. But it is not always safe to rely wholly upon presumptions and, consequently, whatever evidence does exist should always be resorted to. This will usually be found in the return of the execution and in a duplicate certificate of sale which is, generally, required to be filed therewith, and where the sale requires to be confirmed by the court the report of sale will ordinarily contain the information required on this subject. In the latter case, however, the method of conducting the sale and the circumstances attending it are of less importance, as the confirmation cures many defects and irregularities which otherwise would be fatal.[2]

Where a statement of particulars of the sale is found in the certificate of sale, the important features should be abstracted in the same manner as any other instrument. And if the certificate has been assigned, this fact should be noted, with all of the particulars of the assignment.

§ 100. **Redemption.** — If any redemption has been made or attempted, all facts appearing in regard to such act or attempt, with the capacity upon which the person

[1] Blakey v. Abert, 1 Dana, 185; Hastings v. Johnson, 1 Nev. 613; Patterson v. Carneal, 3 A. K. Marsh. 618.

[2] A confirmation has the effect of a judgment and until vacated or set aside by a direct proceeding in the action cannot be collaterally called in question. Herman on Executions, 231, and cases cited.

redeeming bases his right to intervene, should be given.

§ 101. **Confirmation,** when required by statute, is essential to the consummation of the sale.[1] Where this is true, therefore, the abstract should show all the preliminary steps necessary to be taken to obtain such confirmation. These, ordinarily, consist in the filing of a verified return of the sale, and in giving the notice required by statute.[2] The order confirming the sale must also be entered upon the abstract.[3]

§ 102. **The Deed.** — After the statutory time for redemption has elapsed, if the sale still stands, the officer who made the sale, or his successor, executes the deed conveying the title to the purchaser or his assignee. Regard must be had, in abstracting such deed, to all the points suggested in Chap. VII. In addition, however, to the features presented in common with a purchase deed, a sheriff's deed has peculiarities of its own. The abstract should show, therefore, the substance of the recitation and the name and capacity of the officer; whether he made the sale or is the successor of the officer making the same, and that the acknowledgment, in terms, shows the act to be official and not individual.

§ 103. **Other Proceedings** to effect the same end, *i. e.*, the transfer of the debtor's title, are resorted to in some of the States. In the New England States these proceedings are in the nature of a writ of extent, while in Virginia the same end is attained by *elegit* and extent. Again, in most of the States a writ of *venditioni exponas* may be resorted to, to supplement the writ of *fieri facias*, or execution. In either of these cases the abstract should show all the proceedings had preliminary to and in executing the transfer.

And in all cases where a writ of assistance has been issued for the purpose of putting the purchaser into possession, this, together with the return thereof, should be noticed.

[1] Freeman on Void Judicial Sales (3d ed.), § 41.

[2] Whether confirmation entered without giving such notice is valid does not seem to be settled: Freeman on Void Jud. Sales (3d ed.), § 40.

[3] See *ante*, § 86.

CHAPTER XII.

THE EXAMINATION AND ABSTRACT OF A TAX SALE.

SECTION.

§ 107. **Causes of Infirmity in Tax Titles.**—A sale of land for taxes is, perhaps, the most precarious of all the methods of acquiring titles, and requires corresponding vigilance on the part of the examiner. It is often said that courts view titles obtained through such sales with suspicion. This is probably incorrect if the word suspicion is used to imply prejudice against the proceeding. But it is unquestionably true that courts scrutinize carefully every step leading to the transfer of title in such proceedings, and that very many tax sales have been avoided and vacated. The close scrutiny and the great, and sometimes apparently excessive, strictness applied to these cases, arise partly out of the fact that such sale is a species of confiscation. But the chief reason is that the power to sell is conferred solely

by statute, and is not given as an incident to the power to tax.[1] "Where the effect is so harsh and the source of power arises entirely from statute, it must appear that the provisions of law, preparatory to and authorizing such sales, have been punctiliously complied with."[2] This is the general rule, the reason for which is succinctly stated by Judge Cooley.[3] "Tax sales are made exclusively under a statutory power. The officer who makes them sells something he does not own, and which he can have no authority to sell, except as he is made the agent of the law for the purpose. But he is made such agent only by certain steps which are to precede his action, and which, under the law, are conditions to his authority. If these fail, the power is never created. If one of them fails it is as fatal as if all failed." In States where the judgment of a court intervenes before the transfer of title, the same remarks will generally apply, as the party taxed is frequently brought before the court by substituted service only. It will, therefore, appear that the complete abstract of a tax title will require thorough investigation, minute in its character and covering the whole tax proceeding from its inception to the record of the deed and possession of the premises under it.

§ 108. **As to the Assessment.**—The first essential to the validity of every tax is a valid assessment. Without it the groundwork of the tax fails, and there can be no tax. The term assessment commonly includes two distinct processes: First. The preparation of a *list* by the proper officers, comprising a description of all the persons or property found within the jurisdiction and liable to contribute to the particular tax; and, second, an estimate by the assessors of the value of the property, of whatever character it may be, which is to be called upon to contribute, thus forming the basis of an apportionment of the whole tax among the taxable persons within the district. The list, when completed,

[1] McInnerny v. Reed, 23 Iowa, 410; Sibley v. Smith, 2 Mich. 486.
[2] Brown v. Veazie, 25 Me. 359-362.
[3] Cooley on Taxation, 324.

is usually denominated the "tax list" or "assessment roll."[1] The statutes provide when and how the assessment shall be made, and these provisions are always mandatory. The general principle undoubtedly is, that the assessment is so important and vital a step in the tax proceedings that the omission of any requisite in the due conduct of it, or any substantial variance from the statutory provisions, cannot be regarded as a mere irregularity or informality. In other words, the various steps required by law in this regard must be considered, for the most part, as mandatory and imperative, and must be observed with scrupulous exactness.[2] Some States have, by their courts, held assessors to a stricter compliance than others, but it may be said to be a universal rule that an assesssment is void unless substantial compliance with the statute is made to appear.

The abstract should set out the following facts as far as they appear from the records:

1. The date of the assessment from which the liability of persons and property is fixed.

2. Where the statute provides that unoccupied lands, unseated lands or non-resident lands shall be assessed on a different list from the occupied or seated lands, or on a different part of the same list, it should be made to appear whether the proper classification, as required by statute, was made.

3. It should appear to whom the property was assessed, and whether as owner or occupant, and if the name is omitted, or the lands set down as belonging to persons unknown, that fact should be stated.

4. It should further appear from the abstract whether the land was assessed in gross or in parcels. The manner in which it was listed and described should be fully set forth as it appears upon the assessment roll, and the valuation of each parcel stated.[3]

[1] Black on Tax Titles, § 27.

[2] Black on Tax Titles, § 28.

[3] In the following cases it was held that the omission of the dollar mark

5. The assessment roll, when made, is required to be authenticated by the assessor, and compliance with the provisions of the statute in this regard is essential. A substantial omission cannot be supplied by other proof.[1] Therefore, unless such authentication follows *verbatim* the language prescribed by the statute it should be copied bodily, and any other departure from the precise mode of assessment pointed out by the statute should be noted.[2] And it will be well here, as elsewhere, to remember that the existence to-day of a given statute is no evidence whatever that the corresponding statute of last year resembled it in the remotest degree. This is true at least in respect to legislation in many of the States.

§ 109. **The Levy of the Tax.**—The next essential to a tax is the levy. Without a legal levy every tax imposed is a nullity, and the abstracts should show everything entering into it. This involves an inquiry as to the body making the levy, the method of its action and the purposes for which the tax was imposed. It must first appear that the body representing the municipality, whether it be a board of trustees or supervisors, or a common council, had a legal existence. But this inquiry is satisfied if the members constituting such body assumed to act under color of appoint-

as a prefix to the figures which represent the value of the property in the assessment roll, will render the assessment nugatory: Braley v. Seaman, 30 Cal. 610; People v. Savings Union, 31 *Id.* 132. The contrary was held in New Hampshire: Cahoon v. Coe, 52 N. H. 518, 524.

[1] Tierry v. Union Lumbering Co., 47 Wis. 248; State *ex rel.* Harvey v. Cook (Mo.), 19 Cent. L. J. 150; Cooley on Taxation, 289.

[2] In Harvey v. Cook, *supra*, the statute required that the assessment should be made in a "book" which should contain a list of all property in the county, both real and personal. The assessment was made in two books, one containing the personal, and the other the real estate and an affidavit attached, stating that "the foregoing books" contained all the property, etc., *held* that the assessment was void. As to what irregularities will defeat an assessment, see Willey v. Scoville's Lessees, 9 Ohio, 44; Shimmin v. Inman, 26 Me. 228; Smith v. Davis, 30 Cal. 536; Huntingdon v. Central Pacific R. R. Co., 2 Sawyer, 503; Cooley on Taxation, 252-291.

ment or election, and were recognized by the public in so acting—in short, were officers *de facto*.[1]

It must next appear that authority has been delegated to the body, by the legislature, to impose the tax. The charter of the city and the general statutes will supply this proof, and need not be referred to in the abstract, unless the power is conferred by some private or local act.

In order to make a good levy, the body acting, whether such body be a board or the inhabitants of the town or district, must have imposed it either at a regular meeting or at a special meeting called for the purpose, and in the latter case every member must have been notified of the meeting or be present. And a quorum must have been present when the action was had.[2] The records of the municipality will show these facts, and they should be noted in the abstract.

Next, the purpose of the levy must appear. The same records will disclose this fact, which it is necessary to know before passing on the validity of the tax; for the right of a municipality to impose taxes is limited not only by the act delegating to it the power to tax, but also by general principles of law. Thus, no tax can be valid that is not for a public purpose.[3]

And the tax must pertain to the district on which it is imposed.[4]

Finally, the amount of the levy and the aggregate of value of the property assessed in the district should be made to appear, in order that it may be seen that the amount of tax imposed does not exceed the maximum limit laid down by constitutional or statutory provision.

§ 110. **Special or Local Assessments.**—These are assessments made for local improvements, as for opening highways, laying sidewalks, paving streets and the like, and are

[1] 2 Dillon Mun. Corp., § 892.
[2] 1 *Ibid.*, § 286.
[3] Cooley on Taxation, 67; 2 Dillon Mun. Corp., § 763, and note 1.
[4] Cooley on Taxation, 104.

ordinarily made a lien on the specific real property benefitted, and are finally collected in a manner similar to taxes in general. The right to impose such assessments comes to a municipal corporation by express delegation of power from the legislature, and is never extended by implication.[1] It is, therefore, peculiarly essential that in the imposition of such assessments, every provision of the law authorizing them shall have been strictly complied with. If the municipality be a city or village incorporated under a special act, its charter will show just what steps are necessary to an assessment, and it should appear in what manner every provision has been complied with. If the municipality be a town or village incorporated under a general law, the statutes at large will furnish the requisites to validity, and will indicate where the appropriate records are to be found. In any case it is the duty of the abstractor to give fully every step appearing of record, from the petition, which is the basis of the proceeding, down to the placing of the tax upon the collector's roll. From that time on the proceedings are usually identical with the methods used for the collection of other taxes.

§ 111. **The Collector's Warrant or Tax Book.**—It must next appear that the tax in question has been properly placed upon the tax roll, or tax book, and that such roll or book, with a warrant for the collection of the same, has been duly delivered to the proper officer. The abstract should, therefore, show whether the tax roll or tax book and warrant, on their face, comply with the statute,[2] and should also give the dates of the warrant and of its reception by the collector.[3]

§ 112. **The Return of the Delinquent List** is the next step requiring attention. Before land can legally be re-

[1] *Ibid.* 418.

[2] The blending of taxes which, by the law, were required to be kept separate, would defeat the collection of the same. Thayer v. Sterns, 1 Pick. 482; Case v. Dean, 16 Mich. 12.

[3] See Cooley on Taxation, Chap. 13.

turned delinquent, it is usually required by statute that the collector shall demand the tax. In which case his return should show that he has done so. And "if he is required to make collection by distress and sale of goods, if any can be found to levy upon, there should be such a showing of diligent search for goods, and a failure to find them, as would be required of officers to whom executions are committed for service. In other words, the return should show full and complete compliance with all the conditions which, under the statute, are to precede a resort to the land."[1] It must at least show a substantial compliance with the statute, and the substance of the return should be fully set forth in the abstract, together with the description of the land in question.

§ 113. **Judgment and Proceedings Incident Thereto.**—In those States in which the judgment of a court is required to intervene before the sale, the same strictness must be observed in regard to the method of acquiring jurisdiction, and as to the entry of judgment and the issuing of the proper execution, warrant or precept, as in case of any other judicial proceeding; and the mode in which every step required by the statute has been complied with should be fully set out in the same manner.[2]

§ 114. **Notice of Sale.**—Before the sale takes place the publication of notice thereof is usually required. Whatever the provision of the statute may be in this respect it must be strictly complied with. "The most important of the usual requisites of notice of sale, are that it shall give a proper description of the land to be sold and a statement of the time and place, when and where the sale will be made."[3] When the form of the notice is prescribed by statute it must be substantially, at least if not literally, followed.[4] And the same strict compliance is also required in

[1] Cooley on Taxation, 308, and cases cited.

[2] See *Ante*, §§ 92–95.

[3] Cooley on Taxation, 336. For a collection of cases in which defects in notices of sale are discussed, *Ibid.*, 337.

[4] Blackwell on Tax Titles, 223.

respect to the proof of the publication or posting of such notice. Generally the kind of proof indicated by the statute is the only evidence that can be resorted to to sustain the sale.[1] Therefore the substantive parts of the notice, together with the affidavits as to the publication and posting thereof, should be accurately and minutely given in the abstract.

§ 115. **The Sale.**—In respect to the sale the following points will usually require attention from the examiner: *First*, that it took place at the time fixed by law and specified in the notice.[2] *Second*, that it was made at the place designated by law and by the notice.[3] *Third*, that the sale was public and open to competition.[4] *Fourth*, that it was made to the highest bidder,[5] for cash.[6] *Fifth*, that the purchaser is not disqualified from acquiring the title.[7]

[1] Hilgers v. Quincy, 51 Wis. 62. This case is illustrative of the particularity required in abstracting the preliminaries to a tax sale. The statute required that copies of the statement and notice of the sale should be posted "*in*, at least four public places in such county, one of which shall be posted up in some conspicuous place *in* his (the Treasurer's) office." The Treasurer's affidavit showed that the notice was posted "*at*" the office of the County Treasurer. The variance indicated by the words in italics was held to vitiate the sale, and it was further held that the defect could not be supplied by other proof. See County Commissioners v. Clarke, 36 Md. 206; Pierce v. Sweetzer, 2 Ind. 649; Jarvis v. Silliman, 21 Wis. 607; Iverslie v. Spaulding, 32 *Id.* 394.

[2] A sale either before or after the time which has been named for the purpose, is void. Wilkins' Heirs v. Huse, 10 Ohio, 139. See Cooley on Taxation, 338, and cases cited.

[3] A sale inside of a building when the law required it to be made at the outer door, has been held void. Ruby v. Huntsman, 32 Mo. 501.

[4] Any combination between bidders or with the officer will generally defeat the sale. Dudley v. Little, 2 Ohio, 504; Brown v. Hogle, 30 Ill. 119. See Case v. Dean, 16 Mich. 12; Martin v. Cole, 38 Iowa, 141.

[5] See Bean v. Thompson, 19 N. H. 290.

[6] Donnel v. Bellas, 34 Pa. St. 157; Cushing v. Longfellow, 26 Me. 306. But see Longfellow v. Quimby, 29 Me. 196.

[7] The officer who sells cannot buy at his own sale. Payson v. Hall, 30 Me. 319. In some of the States certain other officers are prohibited from purchasing land at tax sale. And generally all persons interested in the estate or whose duty it was to pay the taxes are precluded by law from becoming purchasers. See Cooley on Taxation, 345-351, for a collection of the cases and a discussion of the law on this subject.

Sixth, that the person to whom the deed was made is the same person that bought at the sale, or the legal assignee of the certificate.[1] *Seventh*, that the whole of the land sold was liable to sale.[2] *Eighth*, that the land was sold according to the parcels and description contained in the list, and other proceedings.[3] *Ninth*, that each parcel was sold for its own tax.[4] *Tenth*, that the quantity of land sold was not greater than allowed by the statute.[5] All obtainable evidence bearing upon any of these points should be collected and set forth in the abstract, including of course the full description of the land sold, the amounts for which it was sold, and the name of the purchaser.

The certificate of sale will, of course, be examined when accessible and if recorded, as required in some of the States, its contents abstracted.[6]

§ 116. **Preliminaries to the Deed.**—In some of the States, before the deed can issue, it is requisite that proof shall be filed with the proper officer, of notice to the occupant of the premises, of application for such deed, or proof that the premises were unoccupied. Such notice and proof should be particularly given in the abstract, showing manner of service, the date of such service, the name of the party making the same and the proof thereof.

If the certificate originally issued to the municipality making the sale and has been transferred, any action of the governing body of such municipality authorizing such transfer should be made to appear. If the certificate was issued

[1] Where the sale was made to one with the arrangement that the deed was to be made to another, *held that* it conveyed no title. Keene v. Houghton, 19 Me. 368.

[2] If the lands were exempt from taxation, or the tax had been paid or tendered, the sale would be void. Cooley on Taxation, 322, and cases cited.

[3] For the authorities in support of and qualifying the rule requiring this, see Cooley on Taxation, 341.

[4] *Ibid.*, 342.

[5] Blackwell on Tax Titles, 286.

[6] The certificate is evidence of the sale, but the record of sale is better evidence. McCready v. Sexton, 29 Iowa, 356.

to an individual and has been transferred, it should be made to appear that a legal assignment was made before the deed was executed. The statutes of some States provide that such transfer may be made by indorsement simply, but this has been held to apply to the first transfer only, and any further transfer has been required to be by regular assignment.[1]

If the law requires further advertisement for redemption before the deed issues, this should be abstracted in all respects the same as the advertisement of sale.

Of course the records must be searched to see that no redemption intervened, that the collection of the tax or sale of the land had not been enjoined, and that there has been no adjudication as to the validity of the tax, and that no action is pending wherein those questions are involved.

§ 117. **The Tax Deed.**—In abstracting a tax deed, the suggestions made in Chapter VII. of this work are all applicable. But in addition, all the recitals should be given, as also should be the description. Particular attention should be paid to the manner of execution, the form of the deed, the seal affixed, and the capacity in which the officer making it describes himself as acting. The form of the tax deed is frequently prescribed by the statute, and the form given should be substantially followed. The acknowledgment should also be carefully scrutinized in order that it may appear that the instrument is acknowledged as an official act.

§ 118. **Transfers Other Than by Deed.**—In some States the transfers of land for delinquent taxes are, by operation of law, as by the force of a judgment of some court, or by forfeiture, or by order of a court after action by the judiciary. Direction as to abstracting such transfers must be general, as every State not only has its peculiar enactments, but also its own constructions thereof, and inasmuch, furthermore, as the laws in this respect are changed more or less at every session of the legislature. But if the ab-

[1] Smith v. Todd, 55 Wis. 459.

stractor follows the suggestions given in this chapter where applicable, and constantly bears in mind the necessity of compliance with statutory provision, and gives a complete history of tax proceedings, he will err on the right side if at all. And too much minuteness can scarcely be error in handling tax sales.

Some tax laws permit an action of foreclosure to be brought on a tax certificate before deed, to determine the right of the parties. The same rules apply to abstracting such actions as to other proceedings in the same courts.

§ 119. **Matters Subsequent to the Tax Deed.**—After the deed has passed, the records of the courts must be searched for judgments or actions in which the conveyance has been impeached or sustained. Such actions and judgment should be abstracted after the manner indicated in the chapter on judicial sales.

There are also statutes of limitation, differing in the various States, by which any irregularities in the proceeding or deed are cured by the lapse of time, and other statutes where the expiration of a specified period, coupled with possession or payment of taxes or other acts, render an infirm deed the foundation of a good title.

CHAPTER XIII.

DEDICATION.

SECTION.
123. Definition.
124. An Express Dedication.
125. An Implied Dedication.
126. Acceptance Essential.
127. Method of Abstracting.

§ 123. **Definition.**—Dedication is an appropriation of land to some public use, as for a highway, public square, for pious or charitable purposes or the like, made by the owner thereof and accepted for such use by or on behalf of the public.[1] It is also defined as the act of giving or devoting property to some public use.[2] Such dedication may be either express or implied.[3]

§ 124. **An Express Dedication** may be made by deed, or in case of a municipal corporation, by a vote, or in case of an individual, by a declaration. If made by deed, the records of conveyances should show the fact; if by vote, the fact should appear from the records of the municipality acting. But the declaration spoken of may be either oral or written, of record or unrecorded.

§ 125. **An Implied Dedication** is one presumed from acts, or from acquiescence by the owner in the use of the land by the public, and may be of such a nature as not to be capable of being recorded. Some of these acts proving

[1] Bouvier's Law Dict. Tit. Dedications; Curtis v. Kesler, 14 Barb. 511.
[2] Anderson's Dictionery of the Law, 324; Rees v. Chicago, 38 Ill. 335. See also article on "Dedication," 15 Cent. L. J. 422.
[3] 3 Washburn Real Prop. 72; Williams v. Wiley, 16 Ind. 362.

dedication, and, in some cases, the acquiescence spoken of, may appear from recorded documents. For instance, the owner may sell by deed, subsequently recorded, lots described in the deed as bounded by the street or square alleged to have been dedicated, and here the record would show an estoppel on the grantor to dispute the dedication, as to the grantee. Again, the court records may furnish evidence on the subject, as where there had been an adjudication between the public, or some one thereof, and the former owner or his grantee, whereby the point was directly raised and passed upon, *e. g.*, an action of trespass *quare clausum* for entering thereon, and a plea or answer by the defendant that the *locus in quo* was a highway.

§ 126. **An Acceptance Essential.**—To constitute a dedication, an acceptance by or on behalf of the public is essential. Such acceptance may be either direct, as by vote of the municipality or other body benefitted, or indirect, as by user at the hand of the public and recognition by the town or other body which is the beneficiary. Such recognition may be made in various ways, one of the most common, in the case of a highway, being repairs to the roadway executed by the municipality. Acceptance may be presumed where the gift is beneficial, and use is evidence that it is beneficial.[1]

§ 127. **Method of Abstracting Dedication.**—Where the dedication has been accomplished by deed, the instrument should be abstracted as are other deeds. But in addition any evidence of acceptance which can be obtained should be given.

One of the most common methods of express dedication is by filing or recording a plat of the premises, showing the street, squares, etc., devoted to the use of the public. This method is generally regulated by statute. The duty of the person preparing the abstract in reference to this subject is to give every particular as to the plat and its record which

[1] Abbott v. Cottage City, 143 Mass. 523.

can affect the premises under consideration. To this end, he should give:

First. A copy of the map or plat so far as it touches the land in question. In the majority of transfers of urban property, the description is simply by lot and block as numbered in a specified plat. The boundaries of the lot, and the appurtenant easements therefore, depend upon the plat itself. It is, consequently, necessary that the abstract should show the plat.

Second. That all the formalities required by statute have been complied with. It is not sufficient for a purchaser to know that a certain plat is found on record, since such record can be of no effect as evidence, unless the instrument was entitled to be recorded. And if the plat was placed upon record without being entitled to be so placed, there will occur a break in the record title, since the plat is a part of his deed and furnishes description and rights to easements. It would be well, therefore, to scrutinize carefully the plat, and, taking *seriatim* the requisites prescribed by statute, show how each has been complied with.

Third. The certificate of the surveyor should be given in substance, as should the certificate of the owner, with dates, witnesses and acknowledgment. Of course the date and place of record should appear.

If the plat or any portion thereof has been vacated by any court, a particular record of all steps taken in such proceeding should be given.

In case of dedication by vote of the governing body of a municipality, the abstract should show that a meeting of such body was held, how such meeting was called, that a quorum was present, the substance of the resolutions, and the vote thereon.

The abstract should also show similar facts in case of an express acceptance of a dedication by a corporation.

In case of a dedication implied from acts or acquiescence of the owner, the records will not furnish the evidence required. The proofs bearing on this question will be facts

which are matters of notoriety in the vicinity, as for instance, user by the public, and the length of time such user has existed, recognition by the municipality or other beneficiary: and such facts may be proved by any person conversant with the premises in question.

The abstractor will, of course, be governed in the degree of care exercised in respect to easements, by the circumstances and probability of questions arising in regard to same. Those well established and of public notoriety, will frequently require no mention.

CHAPTER XIV.

TITLE BY DESCENT.

SECTION:

§ 130. **Of The Subject Generally.**—Upon the death intestate of a person seized of lands, descent is instantaneously cast upon the heirs, since the fee can never be in abeyance.[1] But although theoretically and as a matter of law the descent is at once cast, it is, in practice, often exceedingly difficult to ascertain who is the heir to whom the title passes. The qualifications of the person entitled to the inheritance will be designated by the law of descent of the various States. And the qualifications necessary to the inheritance of a given estate are to be determined by the state of the law at the time of the death of the intestate—an important point to bear in mind where legislatures are constantly amending their enactments. To identify the individual, however, who possess the qualifications pointed out by the law is, many times, difficult, and in many more instances is attended with uncertainty, and in almost every case, the public records afford little or no material for an examiner to go upon.

§ 131. **The Search for Record Evidence.**—Before any

[1] 1 Washburn on Real Prop. 18.

person can claim as heir, it is of course necessary that the former owner die intestate. Both death and intestacy must concur. The abstract must, therefore, show the death of the person last seized. If administration had been had, it will be proper to refer to this and the record thereof in the Probate Court, although the granting of letters of administration are by no means conclusive proof of death[1] and probably are not even evidence thereof.[2]

The petition for administration would, however, be a guide to the proposed purchaser and inform him where his inquiries as to the death can be satisfied. The abstract should show what kind of evidence of death was adduced—since, in some cases, administration is granted on presumptive evidence, based on seven years' unexplained absence of the party, or a shorter absence where the occurrence of a disaster (as the wreck of a ship on which the supposed intestate had embarked) has rendered death probable.

Again, decedent must have left no will, or if a will was left, it must be such as not to dispose of the property in question. And the files must be examined for any judicial construction of the will which would be attended with such consequences. In the absence of proof the law presumes intestacy[3] and the granting of letters of administration is persuasive, so far as it goes, that no will has been found. Yet such letters are always subject to revocation upon the discovery and probate of any testament.

Again, although the title vests in the heir at the moment of the ancestor's death, yet such title is liable to be divested if the land should be required for the payment of the debts of the deceased. If the premises constituted the homestead of the intestate, they would, under the generality of the State statutes, descend free from the lien or liability for his debts; and in States where this is the law, this question would be eliminated in regard to such home-

[1] Melia v. Simmons, 45 Wis. 334.
[2] 2 Phil. Ev. (Cowen H. & E. notes), M. p. 92–93.
[3] Lyon v. Kain, 36 Ill. 368.

stead. Where administration has been had, the abstract should show every step taken toward satisfying debts, commencing at the question of jurisdiction, as indicated in the chapter on judicial sales, and showing all orders for presentation of claims against the estate, publication of notices thereto, the time limited for such proof, and the condition of the estate as to settlement and discharge of the administrator.

Again, where administration has been had on an intestate estate, and such estate has been fully administered, an order of the Probate Court will generally be found, assigning the property, real and personal, to those appearing as heirs, and possibly a proceeding in partition, dividing the realty among such parties in severalty. Where this has been done the abstract should show the proceedings particularly, as in other judicial proceedings. These judgments or orders are evidence, although not conclusive, as against persons not before the court at least.[1] Provision has been made in a few of the States for recording a certificate of heirship from the court having jurisdiction of the estates of decedents. Such a certificate would, of course, be equally ineffectual to cut off the right of an actual heir, unless given under provisions of law, which require a judicial hearing and determination, after due notice. It more frequently happens that the only evidence as to who are entitled as heirs, is to be found in the recitals or declarations of the petition for the appointment of an administrator. This, of course, is not strictly evidence, for any purpose, but is generally accepted by conveyancers, in the absence of all other evidence, as raising a reasonable presumption that those named are the only heirs.

In Wisconsin[2] and possibly other States, statutory provisions have been enacted, whereby, in certain cases, an adjudication may be had, determining the descent of lands. And in other States the same object is sometimes sought to

[1] Ruth v. Overbrunner, 40 Wis. 238.

[2] Ch. 286 Laws 1881.

be accomplished by an action to quiet title. Where any such proceeding has been had it should be abstracted in the same manner as any other judicial proceeding, and the judgment should be fully given. Such a judgment would be evidence, although it would not bind anyone not before the court, and jurisdiction of the person cannot be acquired by publication, except under special provisions of statute.

Again, there may exist record evidence of title by descent in the form of the judgment of a court of general jurisdiction in an action brought by a party claiming as heir against another claiming by a similar title. Such a judgment and the action on which it was rendered should be completely abstracted, as it will be conclusive evidence as between the parties to it and their privies, and will assist the proposed purchaser, even though the person offering the land be a stranger to the suit.

So the circumstances of particular cases will sometimes suggest a search of the court records for divorce proceedings, as will be further noticed. And records of marriages and of births may also contain valuable evidence touching the question of descent.

§ 132. **Evidence not of Record.**—As will be seen by perusal of the foregoing section, the records can never furnish irrefragable proof of title by descent. The questions of pedigree and legitimacy always enter into this title, and can only be solved by proofs from extrinsic sources. An abstractor is perhaps not called upon as a matter of duty to supply any information on these points: yet he may suggest proofs and sources of evidence which will be of great value to the attorney to whom the abstract is submitted for perusal. Especially is this the case where the former is on the ground where the former owner lived and died. For instance, affidavits to the marriage of ancestors and the legitimacy and relationship of the claimant may be obtained from parties cognizant of the facts. These are valuable, not as supplying a link, but as pointing out testi-

mony which may support it. In the same manner general family reputation as to the pedigree and legitimacy may be noted. And family records and inscriptions on old tombstones, where they exist and are relevant, may be indicated.

In England it is the practice to compile a genealogical table showing pedigree and descent, and supplement it with certificates, entries in family bibles, in the Royal College of Arms and the like.[1] In America this is usually impossible. Yet cases will occur, where for several generations similar proofs exist, and may be aided by declarations of parties presumed to know the facts and by inscription on tombstones and family reputation.

§ 133. **Dower, Homestead and Curtesy.**—At common law, where a married man dies intestate, there arises at once in his widow the title during her life to one-third of all the real estate of which he was seized during her coverture, to which she has not by her own act barred such right. And her right is paramount to the title of the heir.[2] This rule has been variously modified by statue in different States, but in any case the title of the heir is subject to the rights of the widow, whether a dower interest or an absolute estate. It is, therefore, incumbent on the examiner to ascertain whether deceased left a widow, and whether she still lives and note the fact. And in some States it is important to note whether she was, at the time of her husband's death, a resident of the State wherein the land lies. The records of the Probate Court must be examined also to ascertain whether by any proceeding therein her dower has been set off to her by metes and bounds, or been compounded for. Where any proceeding of this kind has been had, it should be abstracted fully after the manner of other proceedings in Probate Court. If any part of the premises constituted the homestead of the decedent, and he left a widow, it is the law in some of the States, that this homestead descends to the widow *during her widowhood*, thus creating in her an estate which is paramount to the

[1] Moore Abstract Tit. 44-58.

[2] 2 Cooley's Bl. Com. 128.

title of the heir, but which terminates on the death of the widow and before that time if she re-marries. Where this law obtains the abstract should show the existence of homestead, that deceased left a widow, and whether she continues in life and widowhood If any proceeding has been had to ascertain the homestead, this should be abstracted like other judicial proceedings.

If the intestate be a married woman leaving a husband surviving her, the latter, upon the death, takes all the lands of which she was seized for his life—that is, has a life estate thereof as tenant by the curtesy, and this right is paramount to the heir's title. But at common law, before this right could attach, there must have been issue of the marriage, born alive.[1] In many States, however, the statute has changed the common law in this regard also, so that the right to curtesy attaches, although no issue is born of the marriage, and attaches only to lands of which the wife died seized.

In States where the common law obtains the abstract should show the marriage, birth of issue and existence or subsequent death of the husband. In other States the abstractor will be governed according to the provisions of the statute upon the subject.

If the decedent had been married but had procured a divorce *a vinculo*, this fact should appear, and the action in which the marriage was dissolved should be abstracted in the same manner as other judicial proceedings, and the cause alleged and proof upon which the decree proceeded should be given. The substance of the decree, as far as it affects alimony and property rights, should also be set out.

§ 134. **Joint Tenancy.**—Where one joint tenant dies, the whole estate goes to the survivors by what is called *jus accrescendi*. But this right of survivorship has been abolished in most of the States, except as to lands held in trust and those conveyed to husband and wife jointly. In most cases, therefore, where at common law joint tenancy with

[1] Cooley's Bl. Com. 125.

the right of survivorship would have existed, the title goes to the grantees as tenants in common and the interest of each tenant descends to his heirs. Where, and in cases when joint tenancy exists, the facts upon which it depends will be disclosed by the conveyances, and all that is required to appear is the death of one tenant, upon the occurrence of which the right of the survivor at once attaches.

§ 135. **Disabilities and Escheats.**—At common law an alien could not take real estate by descent or by operation of law,[1] and lands might be forfeited to the State for crime or by attainder and corruption of blood.[2] But in this country the disabilities of aliens have been removed by the legislature of all, or nearly all, the States; and the forfeiture spoken of is probably entirely abolished.[3]

If, however, a person die without heirs, his lands escheat to the State.[4] But a proceeding is required to effect such escheat. Usually escheats are, for a specified time, subject to recovery by the heir, upon proof. If any such proceedings have been had they should be carefully and minutely abstracted after the manner of other judicial proceedings. In any State where the disabilities of aliens or felons still obtain, the abstract should give any evidence obtainable on the question of alienage and conviction or pardon. The latter two facts will, of course, appear of record.

[1] Martindale Conv. (2d ed.) 34.
[2] 3 Washburn Real Prop. 47.
[3] 4 Kent Com., 426, 428; Const. U. S., Art III. § 3.
[4] 3 Washburn, Real Prop. Chap. 2.

CHAPTER XV.

METHOD OF ABSTRACTING TITLES TO LEASEHOLD ESTATES.

§ 138. **The Arrangement Under Proper Captions.**—It is stated by Mr. Preston that "when the lands are held for lives or for the residue of a term of years, then the head of the abstract should be in this form: 'An abstract of the title of ——— to a farm, etc., ——— called ———, situate, etc., ———, for the lives of ———. Or for the residue of a term of years, now determined on the death of ———.'[1] This must, of course, be varied in accordance with the facts. In the arrangement of the abstract the title should be considered with a view to the principal estate, that is, the estate out of which the other estates are derived. Whether an abstract of the title to the fee will be required, must depend more or less upon the circumstances of the particular case. The validity of a leasehold depends, of course, upon the right of the lessor to make it; or to create the leasehold estate. But by reason of the public notoriety of the lessor's title, it is the custom, in some instances, not to require it to be shown. It may be stated, however, as a general rule, that in the absence of

[1] 1 Prest. Abst. Tit., 36.

any stipulation, upon the sale of leasehold property, the original title of the freehold or lessor ought to be shown.[1] In which case the creation of the derivative estate should be noticed under the head of fee, since the demise is a charge, or estate, affecting the inheritance. Thus it should be noticed that 'B, being owner, demised to C for 99 years.' But in all subsequent transactions relating to the term, it is advisable that the title to the term should be considered under a distinct head. So if several terms be created, a distinct head should be appropriated for each term, and when a term is surrendered or merged, that circumstance should be noticed. A surrender should also be noticed under the head which deduces the title to the inheritance, merely as a memorandum. The memorandum, after stating the creation of the term, may be to this or the like effect, 'this term is merged,' or, as the fact may be, 'surrendered.' However, when several terms unite in the same person, and the deduction of the title to each term is carried on by the same deeds, then the two heads may be connected and carried on under one arrangement. Thus: 'A demised to B for——years; A demised to C for—— years; B and C assigned to D for the several residues of their terms.' And at whatever point the union takes place, the like arrangement should be made. But, if at any time there be a separation in the title to the terms for years, that separation should be noticed, by continuing the deduction under the particular head appropriate to each term. The like observations are applicable to estates for life, except that the circumstances seldom require such minute attention in regard to them. In general, it will be sufficient to notice, under the head which relates to the inheritance, that the estate for life is determined, merged, or surrendered. But when it becomes particularly important to consider the state of the title to the freehold distinctly from the inheritance, either for the purpose of ascertaining the validity of a recovery, the commencement of a title of

[1] 2 Sug. V. & P., 148; Coventry on Conv. Ev. 143.

dower, or of curtesy, the change of the course of descent, in consequence of an actual seizin, or any like object, it then behooves the person by whom the abstract is prepared to separate the deduction of title to the estate of freehold, for the purpose of judging of all the consequences which result from the state of the title to this estate, as that title has existed at different periods."[1] The complications growing out of long terms of years and numerous derivative estates, so common in England, seldom arise in this country, and, consequently, much of the foregoing will have but little application to the ordinary practice here. It is reproduced, however, in the hope that the suggestions offered may be found of service in complex cases.

§ 139. **Inquiries Incident to the Nature of the Estate.** —The person who examines or prepares an abstract of the title to a leasehold estate will bear in mind the distinction between life estates and terms of years; the former being treated at common law, as a freehold, and the latter as a mere chattel interest. The consequences of which are that a term of years goes to personal representatives instead of descending to the heirs; is not subject to dower; will merge in the freehold; and is liable to sale upon execution as personal property.[2] In several of the States, however, the common-law doctrine, in respect to estates less than freehold has been modified by statute, by making the interest of the lessee of a term of a certain number of years an estate in land, and as such subject to the lien of a judgment, liable to taxation, and to be sold upon execution the same as real estate. The examiner must acquaint himself with the law of his State upon this subject, and pursue his inquiries accordingly.

Estates for life may be incumbered to the extent of the interest in the same manner as estates in fee. Similar inquiries should, therefore, be made respecting judgments

[1] 1 Prest. Abst. Tit., 196–198.
[2] 4 Kent's Com., 94.

and other incumbrances as upon the purchase of a fee-simple estate.

At common law, as above stated, a lease for years, being a chattel interest, goes to the personal representative of the lessee, and, consequently, a title cannot be made from a legatee; nor from the executor without production of the probate and letters testamentary, neither can it be made from an administrator without production of letters of administration. It is also proper to observe that the probate or administration is granted by a court of competent jurisdiction, and is in due form of law. But the purchaser has no occasion to look further than the cause appointing the executor, and the jurisdiction of the court granting the probate or administration. Both have power to give a good and valid receipt for the purchase money and to assign the legal estate for the residue of the term; and the estate cannot be followed by the legatee, although the sale be made for the executor's own debt, or the proceeds of the sale never reached the legatee, unless the purchaser be in some way privy to an intended *devastavit* by the executor. The title to leasehold estates is much simplified by this absolute power of disposition in the legal personal representative of the lessee. Where the legatee has taken it upon himself to assign the term, without the concurrence of the executor expressed on the deed, it is necessary to show that the executor has assented to the bequest. It is, therefore, proper and usual to make the executor a party to an assignment of a term by a legatee, whenever it can be conveniently done; and an actual assignment from the executor to the legatee is frequently taken as the best means of preserving evidence of the executor's assent. It is more than probable that the executor's assent to a bequest at a remote date will be presumed.[1]

The foregoing remarks are applicable to the commonlaw. Under the practice acts in most of the States the entire disposition of the personal estate of a decedent is

[1] Covantry on Conv. Ev., 152.

placed under the supervision and control of the court having probate jurisdiction, and the executor or administrator has no authority to sell, except by order of court, and the title is vested in the legatee or distributee only upon a final order of distribution, in which case, the proceedings are to be abstracted in the same manner as other judicial sales or decrees.

If, however, the legatee has assigned the lease without such order of distribution, or the consent of the executor, it is presumed that he would be estopped, and if there were no other claims against the estate, the assignment, though void at law, would, perhaps, be good in equity.

It is further to be remembered that no person can grant a lease to continue beyond the termination of his own estate—unless made under a power—nor can he create an estate of higher degree than his own. Thus, if A being tenant for life demise for ninety-nine years, this estate, unless confirmed by the person in remainder or reversion, will determine on the death of A. Neither can the tenant of a term, however long, create a life estate, inasmuch as it would be a greater estate than his own.[1] But either the tenant in fee, for life, or for years, may grant a smaller estate out of his own, unless there be some legal impediment.

Of course no person would be rash enough to buy a life interest without some knowledge of the existence of the life. This and the value of the life are points upon which a proposed purchaser may be presumed to have satisfied himself. On the purchase of the widow's estate in dower, or the husband's title by curtesy, the requisites to those legal incidents should, of course, be required and proved.

[1] "If a lessee for years grant to another a rent out of the land, for the life of the grantee, this is a good grant during the term, if the grantee should so long live; but such rent must necessarily be a chattel interest, though limited for the lives of the grantee." 2 Prest. Abst. Tit. 1. "So if a lessee for years grant land to another for the term of his life, the grantee hath the whole term; but with this collateral determination, if the grantee live so long." *Ibid.* 2.

Where a derivative estate or under-lease is the subject of inquiry, it is particularly incumbent upon the purchaser to advert to the terms of the first grant or lease; for whether the under-lessee have actual notice of the superior lease or not, most of the terms, conditions and clauses contained in it are binding upon him. It does not follow, however, that even with notice of the superior lease, all the covenants inserted in it will be binding upon the under-lessee. And the assignee of the land, or of part of the land originally demised, it is well known, may not be bound by some of the covenants contained in the original lease.[1] The distinctions between covenants which run with the land and are binding upon assignees and under-lessees, whether named or not, and those which are merely personal, are very important to be kept in mind by the examiner.[2]

§ 140. **Method of Abstracting the Formal Parts of a Lease.**—1. The premises of a lease correspond, in matter and form, to the granting part of a purchase deed, and should be abstracted in the same manner; the material parts being the names and description of the parties, the recitals, the words of demise, and description of the property demised.

2. The date of the commencement and of the termination of the lease is the next point requiring the attention of the abstractor. This is important, not only as indicating the duration of the estate, but because a fixed and definite period of duration is essential to the validity of a lease for years. It must at least be capable of being made certain.[3] So in leases for lives there must be a certainty of the lives intended.[4] Care must be taken to note that there exists under the lease the duration of the interest professed to be granted, and also the means by which it is to be terminated.[5]

3. The reservation of rent, or other consideration stated,

[1] Lee on Abst. Tit. 90, 91.
[2] See Martindale on Conv. (2d ed.) § 374, *et seq.*
[3] *Ibid.* §§ 322, 323.
[4] 2 Prest. Abst. Tit. 20.
[5] *Ibid.* 10.

should be set out in the abstract, and it should be shown to whom the reservation is made, since rent cannot be reserved to a stranger who has no privity of estate.[1] Where the consideration is the surrender or renewal of a prior or existing lease, the old lease and the mesne assignments, if any, must also be abstracted, since the new lease would not exclude an incumbrance affecting the property under the latter, and the renewed interest is usually held by the courts to be for the benefit of the parties beneficially entitled under the former lease.[2]

4. Stipulations in form of conditions, whereby it is provided that in case of breach thereof the lease shall forfeit and become void, or the lessee may enter, etc., should be set out with precision; and as often as the instrument contains a clause waiving demand of the premises upon condition broken, this should be carefully noted. The importance of such waiver arises both from the difficulty of making a legal demand in case of future forfeiture, and as affecting a previous forfeiture for which no demand has been made.

5. The covenants in a lease should be carefully abstracted, those upon the part of the lessee as well as upon the part of the lessor, and it should be noticed whether assigns are named, so as to be affected by such covenants as would not otherwise operate in their favor or be binding upon them.

§ 141. **The Method of Abstracting the Execution and Acknowledgment** of a lease will not vary materially from the mode adopted in respect to purchase deeds, but the requisites to the valid execution of a lease differ from the rules applied to deeds in some of the States. As a general rule, a lease for a longer period than that for which parol leases are binding, must be by deed; and to be valid against third persons without notice, must be executed, acknowledged, and recorded in the same manner and with the same formalities as a deed of the freehold.[3] At common

[1] Exchange Bank v. Reid, 107 Mass. 41.

[2] Moore's Abst. Tit. 15; Lee on Abst. of Tit. 109, 111.

[3] Wilhelm v. Mertz, 4 Greene (Iowa), 54; Lake v. Campbell, 18 Ill.

law, a term of years could be created either by deed, by writing not under seal, or by parol. But a lease of a separate incorporeal hereditament was always required to be made by deed;[1] and in England all leases required by law to be in writing are now required to be by deed.[2] The Statute of Frauds[3] declares, among other things, that all leases for more than three years, not put in writing and signed by the parties, shall have the force and effect of estates at will only. This statute, with some modifications, has been adopted in all of the States—the time for which parol leases are binding varying in the different States from one to seven years.[4] Under this statute it seems to be sufficient that the lease be in writing, though not under seal.[5] But in many of the States leases, exceeding a certain number of years, are required to be by deed;[6] and in order to

106; Tuttle v. Jackson, 6 Wend. 213; Town of Lemington v. Stevens, 48 Vt. 38; State of Connecticut v. Bradish, 14 Mass. 296; Johnson v. Phœnix Mut. Life Ins. Co., 46 Conn. 92; Kittle v. St. John, 10 Neb. 605; Porter v. Cole, 4 Greenl. 20; Colby v. Kenniston, 4 N. H. 262; Jackson v. Winslow, 9 Conn. 13. But see as to lease of married women, Miller v. Herbert, 6 Phil. 531. And it is to be remembered that possession of the premises may operate as notice of the rights of the tenant. Martindale on Conv. (2d ed.), § 280, and cases cited.

[1] Williams on Real Prop. 362.

[2] Stats. 8 and 9, Vict. ch. 106, § 3.

[3] 29 Car. II, ch. 3.

[4] Kentucky, 1 year, Gen. Stats. 1873, p. 257, § 16; Minnesota, 1 year, Stats. 1873, Vol. 1, p. 692, § 10; Mississippi, 1 year, Rev. Code 1871, § 2302; Nebraska, 1 year, Gen. Stats. 1873, p. 872, § 1; New Jersey, 2 years, Rev. Stats. 1874, p 92, § 9; Rhode Island, 1 year, Gen. Stats. 1872, p. 350; West Virginia, 5 years, Code 1870, p. 459. In some of the States, viz., Ohio, New Hampshire. Missouri, Massachusetts, Maine, Vermont and Indiana, all leases not in writing have the force and effect of estates at will only. Taylor's Landl. & Ten. (7th ed.), § 29; Rev. Stat. Mo. 1879, § 2500.

[5] Den. v. Johnson, 15 N. J. L. 116; Allen v. Jaquish, 21 Wend. 635; Olmstead v. Niles, 7 N. H. 526.

[6] In Massachusetts and New Hampshire a lease for more than seven years must be by deed. Gen. Stats. Mass., ch. 89; Gen. Stats. New Hampshire, 1867, p. 252, § 4. In Minnesota, leases for a term exceeding one year must be by deed or conveyance in writing. Stats. Minn. 1873, Vol. 1, p. 692, § 10. So, also, in Vermont, Gen. Stats. 1873, p. 448, § 7. In Virginia, if for a term of more than five years, it must be by deed. Code of Virginia, 1873, p. 887, § 1.

be valid against third persons without notice must be executed, acknowledged and recorded with the same formality as a conveyance of the freehold.[1] But, as between the parties and purchasers with notice, a lease is valid, without being acknowledged and recorded.[2]

In North Carolina it has been held that both parties are required to sign in order to be bound by the covenants,[3] while in Nevada it was held that a party to a lease will become liable on the covenants by accepting it, though he do not sign.[4] A lease in form of an indenture must be delivered to both parties.[5]

When a lease has been executed by an agent, caution is to be observed in three things, namely: The authority must be sufficient,[6] the agent must pursue his authority strictly, and must grant in the name of his principal,[7] and where a lease has been granted under a power it should not only be seen that the power was strictly followed, but it should appear that the terms of the power authorize the particular kind of lease granted.[8] In the application of these principles also, the authorities will be found to vary in point of stringency in different States, and the examiner must, therefore, determine any question that may arise by the laws of the particular State.

[1] Rev. Stats. Maine, 1871, p. 560, § 8; Gen. Stats. Vermont, p. 448, § 7; Taylor's Landl. & Ten. (7th ed.), § 171; Brohawn v. Van Ness, 1 Cranch C. C. 366; Locke v. Coleman, 4 T. B. Mon. 315; Richardson v. Bates, 8 Ohio St. 560.

[2] Lake v. Campbell, 18 Ill. 106; Town of Lemington v. Stevens, 48 Vt. 38; Johnson v. Phœnix Mut. Life Ins. Co., 46 Conn. 92; Kittle v. St. John, 10 Neb. 605. An unacknowledged and unrecorded lease is valid as to one who has actual notice. Wilhelm v. Mertz, 4 Greene (Iowa), 54; Tuttle v. Jackson, 6 Wend. 213; State of Connecticut v. Bradish, 14 Mass. 296; Porter v. Cole, 4 Greenl. 20; Colby v. Kenniston, 4 N. H. 262; Jackson v. Winslow, 9 Cow. 13.

[3] Warde v. Newbern, 77 N. C. 460.

[4] Filton v. Hamilton City, 6 Nev. 196.

[5] Kelsey v. Tourtelett, 59 Pa. St. 184.

[6] In general, where the lease is required to be by deed, the authority of the agent must be under seal. Martindale on Conv. (2d ed.), § 230.

[7] Shep. Touch. 270.

[8] Lee on Abst. Tit. 104.

§ 142. **Assignments and Under-Leases.**—The assignment of a lease is required by the English Statute of Frauds to be by deed, note or writing signed by the party or his agent thereto lawfully authorized. This statute has been adopted in most, if not all, of the States, with more or less modification. It may be stated as a rule of universal application that no special set of words or phrases need be used. All that is essential is that the intention of the parties shall appear. But under the common law the assignment must be under seal to convey the legal interest, and where the estate is of a freehold nature, of course the assignment must be that description of instrument suited for passing freehold estates.[1]

The first inquiry that suggests itself in respect to the assignment of a lease is whether license or consent of the landlord is required, and if so, whether it has been obtained. If license has been once granted the restriction is forever gone, unless a specific license is provided for.

So the purchaser of a derivative lease should always see that the covenants for renewal of the original lease extends to the making of new under-leases upon the renewal of such orignal lease, and upon what terms; and whether there be a covenant that the under-lessees shall hold on after the original lease is surrendered, until a new lease is granted. Caution is necessary on the part of the purchaser of a derivative renewable lease, in regard to the renewals, which can usually only be made with the persons possessed of the original legal term; and this observation particularly applies to cases where the legal term has been vested in trustees. This suggests the desirability in practice for a purchaser or mortgagee of a renewable leasehold to take an assigment of the whole length of term, rather than rely upon a derivative term, to which no right or power of renewal can attach; although the act of taking an assignment may in some cases expose the assignee to liabilities in re-

[1] Lee on Abst. Tit. 87.

spect to rent and covenants.[1] The importance of recurring to the terms of the first grant to ascertain what covenants will be binding upon the assignee has already been suggested.

It is important where a leasehold is purchased to have produced the last receipt for the rent, not merely for the sake of ascertaining that there are no arrears, but for the purpose of showing that up to the date of the receipt no forfeiture has been incurred, or that as far as may be by receipt of rent subsequently, any prior forfeiture has been waived.[2]

[1] As to assignments of leasehold property, it is observable that acceptance of the lease is an acceptance of all its liabilities; and actual entry on the land is not necessary; neither is it necessary that the assignee sign the deed to support an action upon the covenants against him. Covantry on Conv. Ev. 147.

[2] Lee on Abst. Tit. 94.

CHAPTER XVI.

THE SEARCH FOR LIENS AND INCUMBRANCES.

SECTION.

§ 145. **Of the Subject Generally.**—Last, but by no means least, among the duties of an abstractor, is the search for liens and incumbrances against the property or title under investigation. Liens and incumbrances, like many other branches of the law concerning titles to real estate, are so far controlled by statute and local laws as to render anything more than a few general observations, impracticable. The effort of the writer will be, as in other por-

tions of this work, to suggest the points to which attention is to be drawn, and leave the reader to investigate the law on the subject for himself.

§ 146. **Liens in Favor of the United States.**—Balances due from any officer receiving money for the government are a lien upon the property of such officer and his sureties, from the date of levy of a distress warrant and the record thereof in the office of the Clerk of the District Court of the proper district.[1] The internal revenue tax is a first lien upon a distillery,[2] and all taxes due the United States constitute a lien upon the property of the persons liable to pay the same, from the time they are due until paid, with interest, penalties and costs.[3]

§ 147. **Debts Due the State on Public Accounts.**—The statutes, in many of the States, contain similar provisions to those of the United States, in respect to balances due from officers and agents of the commonwealth on public accounts. The circumstances which give rise to such liens are usually of public notoriety, and will generally suggest the nature of the search to be prosecuted.

§ 148. **Official Bonds.**—A variety of statutes have been enacted in the different States with respect to the official bonds of certain officers, whereby such bonds are declared to be a lien upon all the real estate held jointly or severally by the officers giving the same and their securities, from the time of filing until the officer is duly discharged of the trust. This provision is most frequently applied to the bonds of treasurers and tax collectors and their sureties. Such bonds are usually to be found of record in some designated public office, the files and records of which should be examined, and a minute made of any bond made by the present or former owner of the real estate in question, which would constitute an existing lien upon the same.

[1] U. S. Rev. Stat. § 3629.
[2] *Ibid.* § 3251.
[3] *Ibid.* § 3186.

§ 149. **Taxes Due the State or Municipality** are usually a first lien upon the property assessed, from the date of the assessment until paid. In some of the States statutes have been enacted making taxes assessed on personal property also a lien upon the real estate of the owner.[1] The date from which taxes become a lien varies in the different States, and is subject to such frequent legislative changes that no one who undertakes to examine a title or prepare an abstract will fail to be posted on the laws of his State in this regard. Also as to the offices and records in which searches are to be made for current and delinquent taxes and tax sales or other proceedings thereon.

§ 150. **Special Assessments Under City Ordinances.**—Municipal corporations may, when authorized by charter or the general law, provide by ordinance for making special charges upon real estate for public purposes; such as opening or grading streets, paving or lighting the same or establishing and maintaining sewers or water works. The laws regulating such charges and the enforcement of the same are local and statutory, and must be consulted with reference to the particular case.

§ 151. **Judgments and Executions.**—Judgments are to be searched for in the proper offices against all those who have held the land within the period for which they are a lien, from the beginning of such period down to the date of their respective conveyances. The search, however, is seldom carried back beyond the period when the owner became adult, unless there be reasons to expect there are judgments against him while a minor. Judgments are generally a lien upon all real estate of the judgment debtor situated within the county for which the court sits, from the date of the rendition thereof. The lien attaches from the time of ownership of such debtor, but as judgments obtained prior to the commencement of ownership affect the seizin when ac-

[1] Union Trust Co. v. Weber, 96 Ill. 346.

quired, search should be extended beyond the commencement of ownership. It is observed by Mr. Coventry that the solicitor for a purchaser is justifiable in not searching for incumbrances against any other proprietor than the vendor, if he finds no judgment entered up against him within ten years, unless there are very obvious reasons why the search should be continued further or against a former proprietor. The same author says, "with respect to the person against whom it is necessary to search for judgments, the presumption is that the notorious change of ownership and possession occasioned by a sale would have brought to light a docketed judgment, if any existed, against a former proprietor; it is also presumed that each purchaser in the title has exercised the common prudence of making a regular search for judgments against his vendor. With respect to the time during which it is usual to search, the term of ten years has been fixed upon as a convenient and probable period during which it may be fairly supposed a judgment creditor whose debt honestly incurred would not remain dormant."[1] We know of no instance in which any such practice has been recognized or presumption invoked by the courts of this country to relieve an examiner from the charge of negligence where an existing lien had been overlooked, but the abstractor will give to it such weight as he thinks it entitled under the particular circumstances of the case, in determining against whom and for what length of time he will make the search.

In New York, if a judgment is suspended by injunction or appeal, the time of the lien is extended for the period it is suspended,[2] and similar provisions may exist in other States.

Judgments in the United States Circuit or District Court rendered within any State cease to be liens on real estate and chattels real, in the same manner and at like periods as

[1] Coventry on Conv. Ev. 231.

[2] N. Y. Code of Civil Procedure, Sec. 1285.

judgments of the State Courts,[1] and are, to a certain extent, subject to State legislation. In general, judgments rendered in a Federal Court have the same lien on land of the debtor within the territorial jurisdiction of the court as are given to State Courts within the territory for which they sit.[2] But in some of the States, to become a lien in any other county than that in which the judgment is rendered, a certified copy thereof must be filed and recorded in such county.[3] Where this provision does not exist, it is just as important to search the records of the United States Courts for judgments as the local State Courts, except that the limited jurisdiction of the Federal Courts renders it less probable that any judgment will be found.

Judgments in the Supreme Court of the State are, ordinarily, a lien upon any property of the judgment debtor within the State, but as such courts have appellate jurisdiction only, except in a limited number of proceedings, a record of the case in that court will usually be found in the local tribunals.

In what local courts the records and dockets are to be searched for judgments will depend, of course, upon the laws governing the jurisdiction and defining the powers of the different courts. Ordinarily, judgments rendered by justices of the peace are not liens upon real estate until a transcript is filed in a court of record, or other office designated, for which a search should be made.

The appearance dockets of courts of general jurisdiction should be searched for pending causes which might come to judgment during the term, and to guard against judgments that may have been docketed on appeal from justices' court.

Search must be made in the office of the sheriff of the county to ascertain whether there are in his hands any writs

[1] U. S. Rev. Stat. § 967.

[2] Simpson v. Niles, 1 Ind., 196; Shrew v. Jones, 2 McLean, 78; Brown v. Pierce, 7 Wall. 205; Branch v. Lowery, 31 Tex. 96; Sellers v. Corwin, 5 Ohio, 398; Lawrence v. Belger, 31 Ohio St. 175. But see Vance v. Johnson, 10 Humph. 214.

[3] See Minn. R. S. (1887) 751, § 279.

of execution against the vendor or which may constitute a lien upon the lands in question. In some of the States, sheriffs are required to keep a foreign execution docket on which executions issued from other counties are entered and become a lien from the date of such entry; in other States they are a lien from the date they are received by the sheriff, and in others from the date of the levy only.[1]

When judgments or executions are found they should be set out in the abstract, giving the name of the court, the term at which judgment was rendered, the style of the cause and the amount of the judgment, the amount of interest and date from which it is to be computed, and the amount of the costs stated separately; also the date of the execution and when returnable.

§ 152. **Forfeited Recognizances.**—The acknowledgment of a debt before the judge of a court of record, perfected by enrollment, is equivalent to a judgment, and generally all recognizances when properly filed, with a certified order of the court forfeiting the same, become liens upon the real estate of the obligors the same as other judgments. Search must, therefore, be made in the proper offices for such incumbrances.

§ 153. **Attachments and other Judicial Proceedings.**—Attachment is a common method of creating a lien upon the property of non-residents and persons who seek to avoid the payment of their debts. To become a lien upon real estate such proceedings must, ordinarily, be commenced in a court of record; but in some of the States attachments may be issued on land by justices of the peace and remain a lien upon the same for a specified time.[2] Generally, attachments may be issued by courts of record to any county in the State, which become a lien upon real estate from the levy thereof. A search of the files and dockets of courts of record and of

[1] *Ante*, § 94.

[2] In Pennsylvania, an attachment on land, before a justice of the peace, remains a lien for sixty days from the date when an execution might have been sued out. If the cause be appealed, then sixty days after final judgment. Brightly's Purd. Dig., 446.

the sheriff's office will usually disclose any such lien or other judicial proceeding affecting the title under investigation.

§ 154. **Lis Pendens.**—It is a general rule, independent of statutory provisions, that a suit is constructive notice of the rights sought to be enforced and a purchaser during the pendency of the suit is bound by the finding or decree. This applies, however, to those only who derive title to the subject-matter from a party to the suit, after it is commenced, and not to one who has a title paramount to the parties to the suit. Under some statutes, notice of the pendency of an action is required to be filed at the time of the filing of the complaint, and the suit is constructive notice only from the filing of the *lis pendens* as it is called. In some of the States such notice is required to be filed with the clerk of the court and in others it must be filed in the office of the Recorder of Deeds. The abstractor will, of course, be governed in his search by the provisions of the statute on the subject.

§ 155. **Mechanic's Liens.**—Under the statutes of most, if not all, of the States, mechanics, contractors and material men have a lien on the buildings erected and the land on which they are situated for their pay. Such lien is against the title of the person contracting[1] and cannot be enforced against the property of a third party in temporary use of another,[2] nor against any mere conditional interest. The notice required to be given and other steps essential to the creation of such lien depend entirely upon the statute, which must be consulted in reference to the search to be made for such incumbrances.

§ 156. **Vendor's Liens.**—In several of the States a vendor has an equitable lien on the land sold for the purchase money. The lien exists against all the world, except *bona fide* purchasers without notice. A purchaser without notice of the lien, who has got the legal estate and registered

[1] Hickox v. Greenwood, 94 Ill. 266.
[2] Tracy v. Rogers, 69 Ill. 662.

his deed, can hold the land discharged from the lien; but if he had, before he paid his purchase money and obtained his conveyance, notice of the lien, the estate will be charged in his hands. As a general rule, every suspicious circumstance which would put a cautious man upon his guard and suggest inquiry, will be deemed notice. It is, therefore, the duty of the examiner to follow up any inquiry thus suggested. In some of the States this lien has never been recognized, while in others it has been abolished by statute.

§ 157. **Decedent's Debts.**—It is a general rule that the heir or devisee takes the estate subject to the ancestor's debts, but in some of the States if the land is sold *bona fide* before an action is brought, the heir or devisee, and not the purchaser, is liable to creditors for its value,[1] while in others the debts remain a lien upon the estate for a certain number of years and unless administration is granted or an action commenced within that time the lien is discharged.[2] In a majority of the States, perhaps, even though administration is pending, the debts must be proved up and allowed against the estate within the time limited by law or the order of the court, or they cease to be a lien. An exception to this rule exists in some of the States in favor of debts which constitute a specific lien upon certain real estate and debts that are not due and payable within that period. In Pennsylvania, for example, where the debt is not due within the time for which a lien is provided, a written statement of the indebtedness may be filed in the office of the prothonotary of the county where the real estate is situated, which will have the effect to extend the lien of such debt for five years after the same becomes due.[3]

§ 158. **Legacies and Annuities.**—Legacies charged upon lands form a lien upon the property and, therefore, where the title derived under a will charging legacies upon

[1] Ill. R. S., 743, § 12; Ky. Gen. Stat., 320, § 48; Wis. R. S., § 3285.

[2] See N. Y. Code Civil Procedure, §§ 2777, 2778; Brightly's Purd. Dig. (Pa.), 422, § 88.

[3] Brightly's Purd. Dig., 422, § 88.

the land devised, proof of payment or that they have been released should be required.[1]

Or if the land is charged with the payment of an annuity, its discharge must be proved in the same way as the release of a legacy. "The period within which an annuity may be presumed satisfied must depend on the life for which it is granted. If it is fair to presume, in the natural course of things, that the annuitant is dead, the want of a certificate of burial cannot be considered as an insuperable objection to the title, but no case has occurred in which such a presumption has been made in less than thirty years."[2]

§ 159. **Trustees' Expenses.** —It is a well established doctrine in equity, that the expenses and disbursements of a trustee made in that capacity are a lien on the trust property. The rule applies generally to agents, executors, guardians and all who act in the capacity of a trustee by regular appointment.[3]

The subject, however, is regulated to a greater or less extent by statute in many of the States.

§ 160. **Mortgages and Deeds of Trust** in the nature of mortgages are incumbrances of the first degree, and are usually abstracted in chief. This is perhaps the most eligible method, though the circumstances will often render it unnecessary to do more than simply mention the incumbrance. Where mortgages have been satisfied and discharged of record it is only necessary to refer to the instaument very briefly, but the discharge should be abstracted at sufficient length to show whether the lien has been properly discharged and the legal estate revested in the mortgagor; this is specially important where the common-law doctrine of mortgages prevails.

§ 161. **Leases.**—A lease is an incumbrance upon the fee to the extent of the interest held under it. We have

[1] Coventry on Conv. Ev. 267.
[2] *Ibid.* 264.
[3] Hill on Trustees, 567.

seen, in a former chapter,[1] that leases for a number of years, in some States a greater and in others a less number of years are required to be in writing acknowledged and recorded in the same manner as conveyances of the fee; and the method of abstracting these instruments has also been discussed. The subject is adverted to here merely to suggest that leases are properly treated as incumbrances when considering the title to the fee, and should be so appended in the abstract. Whether a lease found of record which has expired by lapse of time should be noticed in the abstract or not, will generally depend upon its having been renewed, or upon the covenants for renewal if the time has recently expired. Leases are to be abstracted briefly or at length, according as the circumstances and length of the term may indicate. The importance of making inquiry of the tenant, or party in possession, in reference to his right or title in the premises, cannot be too thoroughly impressed upon the examiner, or the purchaser, if he assumes that responsibility, since possession may operate as notice of rights not disclosed by the records. In order that the tenant or occupant may be estopped from setting up any claim different from that disclosed, he should first be informed of the proposed purchase or other object in making such inquiry.

§ 162. **Dower and Curtesy** have both been discussed in a previous chapter,[2] but as they constitute a species of incumbrance upon the estate in fee it is thought proper to notice the subject briefly under this head.

There are several modes by which the wife may be barred of her dower interest in the lands of her husband, varying in many respects in different States. In general, she may release her dower by joining in a deed with her husband, or be barred by accepting a provision in his will in lieu of dower, by a divorce *a vinculo*, by acts which estop

[1] *Ante* Ch. XV.
[2] See *Ante*, § 133.

her from setting up dower—as a statement to an innocent grantee that her dower had been extinguished—or by an assignment in bar.

Tenancy by the curtesy may also be released by joining with the wife in a conveyance to a third person, or by a judgment of divorce. The estate has been abolished in many of the States, and other statutory provisions have been substituted in several of them to take the place of both dower and curtesy, with which abstractors will not fail to acquaint themselves.

§ 163. **Easements and Servitudes** constitute another form of incumbrance upon the fee, which not unfrequently materially diminish the value of the estate. They are as various in character as the exigencies of domestic convenience or purposes to which buildings and land may be applied. Some of those which attach to land as appurtenances are enumerated in Bouvier's Law Dictionary, as follows: "The right of pasture on other lands; of fishing in other waters; of taking game on other land; of way over other land; of taking wood, minerals, or other produce of the soil from other land; of receiving or discharging water over, or having support to buildings from other lands: of going on other land to clear a mill stream or repair its banks, or draw water from a spring there, or to do some other act not involving ownership." That most common, perhaps, is the right of way, of a railroad or highway. The land or estate subject to any such rights is incumbered or reduced in value to the extent that the easement is burdensome. All easements must originate in a grant or agreement, express or implied, of the owner of the servient tenement. The evidence of their existence, by the common law, may be by proof of the agreement itself, or by prescription, requiring actual and uninterrupted enjoyment immemorially, or for upwards of twenty years, to the extent of the easement claim, from which a grant is implied. An intimate knowledge of the situation of the property will generally acquaint one with the existence of any easement not disclosed by the records.

§ 164. **Miscellaneous Liens and Incumbrances.**—A variety of statutes have been enacted in different States providing for liens upon real estate for various public purposes, such as poor rates, highway rates, sewer rates, or for lighing or paving streets, water tax, mutual insurance notes, drainage and ditch laws, which are purely local, but will require to be searched for where any such laws exist.

§ 165. **The Abstractor's Certificate.**—Having completed his searches the last act of the abstractor is to attach his certificate to the abstract, stating what it purports to contain. The form of such certificate does not appear to be material, unless it is intended to limit the liability of the abstractor, in which case this intention should be clearly set forth. For example, if any of the searches have been omitted, or an inquiry suggested has not been followed up and the abstractor desires to avoid responsibility therefor, or if it is the intention to limit his liability generally for all mistakes and omissions, this fact must be so stated as to bring it to the notice of the person for whom the abstract is prepared. Courts proceed upon the theory that one who undertakes to examine a title and prepare an abstract for hire, undertakes to make a thorough and complete examination, unless he gives notice to the contrary.[1]

[1] Chase v. Heaney, 70 Ill. 268.

CHAPTER XVII.

PERUSAL OF THE ABSTRACT.

SECTION.

§ 168. **Preliminary Observations.**—In no part of the ordinary duties of a lawyer is there more responsibility than in the investigation of a title to real estate, with a view of certifying to its good character. Nothing short of experience will render a person competent to cope with all the little difficulties that may beset the inquiry as to the title being a good one, and this experience can be had only after the acquisition of a thorough knowledge of the law of real property. He must, in the course of his investigation, meet and unravel the difficulties which arise, either from the doubtful construction of the words of some one or more of the instruments, the absence of evidence of certain facts, or the operation of some statute or rule of law, as well as pass upon the nature of the estate, or of the title deduced and the incumbrances by which it is affected.

In the present chapter, as in previous portions of this work, nothing further will be attempted than to present a few general rules, and to suggest some of the points to which attention is to be drawn in pursuit of the investigation. Every title must, to a great extent, depend upon its own circumstances, and it is beyond the reach of human ingenuity to suggest observations which would be applicable to every case, since there ever has been and ever will be an infinity of circumstances existing, as far as experience goes, for the first time. Nor could it be hoped, within a limited space, to point out any considerable portion of the numerous questions that have arisen and been decided touching the validity of titles to land.

§ 169. **Duty of Counsel in Respect to the Abstract.**— According to the English practice, it is the duty of the solicitor for the purchaser to compare the abstract with the original documents or evidence of title, for the purpose of ascertaining: 1. "That what has been abstracted is correctly abstracted. 2. That what is omitted is clearly immaterial. 3. That the documents are perfect as respects execution, etc. 4. That there are no indorsed notices, nor any circumstances attending the mode of execution, attestation, etc., calculated to excite suspicion."[1] The importance of such comparison being made by counsel, where the services of a solicitor does not intervene, has been referred to in a former part of this work.[2] Every part of every document ought to be read through, since notice of an incumbrance is equally notice whether contained in one or another part of a deed. The verification of the abstract, however, will depend very much upon the local practice and the degree of confidence placed in the ability, fidelity and financial responsibility of the person preparing the same. In large cities it is the custom to accept abstracts made and duly certified by a reputable person or firm en-

[1] Dart on Vendors, 381.
[2] *Ante*, § 5.

gaged in that business, without such comparison; and, perhaps, where the abstract is presented to counsel by his client, with the request for an opinion upon the same, the counselor would be justified in accepting it as presenting the true state of the title, without further question. But if there should be any reason to suspect that the abstract was prepared by an incompetent person, or that it was incomplete, or contained inaccuracies, it would be the duty of counsel to so inform his client, or to make the comparison above suggested. And in all cases where the abstract has been prepared by the solicitor of the grantor the necessity for such comparison will exist, as he would, perhaps, not be held responsible to the purchaser for any inaccuracy or defect in the abstract.[1]

Having satisfied himself as to the reliability of the abstract and that it has been carried back far enough, or that the starting point is safe and satisfactory, the next duty of counsel relates to the perusal of its contents. Here, as we have observed, the whole learning of the law of real property is involved; the inquiry relating first to the character of the evidence adducible in support of the claim of title.

§ 170. **The Kind and Degree of Evidence to be Required.**—In respect to the evidence required to support a title, counsel will of course be governed by the circumstances of the particular case, and no definite rule can be fixed for his guidance. It is observed by Mr. Coventry that the evidence required by a conveyancer is not that strict minute proof which raises a conviction little short of actual observation, but merely such as affords reasonable belief that the requisite evidence exists and can be procured when wanted.[2] The proofs required in all cases out of court are, or ought to be, such as will carry conviction to every reasonable mind, and if they do not amount to that, they ought undoubtedly to be rejected.[3] It may be stated as a

[1] See *infra*, § 185.

[2] Coventry on Conv. Ev. 3.

[3] Lee on Abst. Tit. 267, 268.

rule of universal application, that the best evidence ought to be adduced of which the nature of the circumstances admit, and failing that the next best evidence is to be sought out. Evidence admitted by the courts being the strictest kind, it follows, that whatever is allowed to be evidence by the courts is *a fortiori*, to be admitted in conveyancing matters out of court.[1]

§ 171. **The Direct and Primary Evidences of Title** usually comprise the originals of all patents, deeds, wills, court rolls and other records and documents affecting the title. But cases frequently arise in which the evidence required upon an abstract is of a peculiar nature. It is not necessary that there should always be deeds or wills produced affecting the property in question during the period for which the title is required to be shown. Possession of itself is a sufficient title when shown to have been held under the proper conditions and undisturbed for the requisite number of years.[2] A title may also depend upon descent, but such titles are always to be viewed with great jealousy.[3] "Indeed it is said to be ranked by conveyancers among the worst titles; and if it depends upon several successive descents, it is scarcely marketable."[4] In questions of pedigree the conveyancer requires the same proof of re-

[1] Lee on Abst. Tit. 268.

[2] "To force such a title on a purchaser, it is not sufficient merely to show possession by the vendor for twenty years. If the vendor relies on possession of twenty years as giving him a good title, he must show who the person is that, but for this possession, would be the owner in fee-simple in possession; and that twenty years' possession barred his right, unless the possession has extended to such a length of time as would bar all persons. Taylor on Titles, 53. It must also be borne in mind that possession for the period fixed by the statute will bar only the party entitle to the immediate possession. It will not operate to defeat the right of a person entitled to a reversion until the expiration of time limited from the date at which the revisioner acquired the right of entry. Hays on Conv. 253.

[3] Atkinson on Titles, 374.

[4] Taylor on Titles, 61.

lationship, deaths and intestacies as courts of justice.[1] The object is to show that the claimant is next heir to the person last seized.[2]

§ 172. **Secondary Evidence.**—Exemplified copies of the records of patents, deeds, wills and other records and documents, in keeping of any officer of the State or general government, are secondary evidence of the highest character, and are usually accepted by the conveyancer without question, unless there is some special reason for extraordinary caution. To the admission of secondary evidence in court, proof of the loss or destruction of the original document is a necessary preliminary; but in many instances statutes have been enacted making certified copies of certain records and documents admissible as direct evidence.[3] "With respect to copies generally, it is to be observed that a copy of a copy is not evidence, for the courts require the best evidence the nature of the thing admits, and the further off anything lies from the first original truth, the weaker must be the evidence; besides there must be a chasm in the proof; for it cannot appear that the first was a true copy."[4] The foregoing observation cannot be applied to copies of official records, which are themselves copies of the original documents, where the law makes such records, or copies thereof, original evidence: but the general rule of evidence as above stated is correct.

Under the English practice, memorials are frequently resorted to, as a means of furnishing secondary evidence of the contents of lost instruments, but the doctrines respecting them have no application to the laws of this country. The registry laws so universally adopted in the United States have limited the instances in which there would be

[1] Covantry on Conv. Ev. 274.

[2] See, as to the subject generally, *ante* Ch. XIV.

[3] See Barton v. Murrain, 27 Mo., 235, where it was held that an exemplification of a patent, certified by the Commissioner of the General Land office, may be received in evidence without proof of loss of the original.

[4] Taylor on Titles, 136.

any occasion to resort to memorials, to the cases in which deeds have been lost before being recorded, or in which the records have been destroyed. In some of the States, statutes have been enacted providing a method of perpetuating testimony as to the existence and destruction of such records and documents. In all such cases possession of the premises under the alleged grant will furnish important corroborative evidence in establishing the same, and the longer the possession has continued the greater the presumption in favor of the grant, perhaps. But there seems to be some danger in allowing mere length of possession and dealing with the property to be sufficient corroborative evidence where the proof as to the estate or interest conveyed is not clear and satisfactory. For example, the tenant of a term or for life might after destroying the deed, convey in fee, and the property might pass through various hands during the continuance of his estate and there might thus be possession and dealing with the property for a long term of years, consistent with the right of possession and with a conveyance in fee. The person entitled in reversion is not supposed to inquire until his right has accrued, and when it does he may have to contend against evidence offered of a grant in fee and possession and dealing, said to be consistent with it, but he will not be barred by such possession, providing he can establish the true character of the estate under which it was held.

Recitals contained in deeds, decrees and other instruments, furnish very important secondary evidence sometimes. "The rule generally acted upon with respect to recitals," says Mr. Preston,[1] "has been, that statements contained in deeds thirty years old or upwards may be considered as good evidence," and where the facts recited are not very important, a purchaser may be satisfied with such recitals without other evidence, even if contained in deeds

[1] 3 Prest. Abst. Tit. 8.

of more recent date. But where the facts are very important, a purchaser will not rely upon the recitals even of an old deed, particularly if better proof *aliunde* can be obtained.[1] Much, therefore, depends upon the nature of the recital as well as upon its antiquity. It is observed by Mr. Lee that recitals as to contents of deeds are more to be relied upon than recitals as to pedigrees. Parties may themselves, without any fraudulent intention, mistake a pedigree, whereas a deed can seldom be incorrectly recited, unless through fraud or otherwise intentionally; therefore, the former requires to be more narrowly searched into.[2] And recitals in a deed prepared by direction of a court of equity or probate court and approved by a judge or master, are more to be relied on than other deeds, in consequence of the strictness with which facts and statements are required to be verified.[3] By statute in some of the States such recitals have been made *prima facie* evidence of the facts recited. But, generally speaking, recitals cannot alone be taken as evidence against strangers or others not parties to the deed containing such recitals. They are always taken as admissions of those who are parties to the deed and interested in the property; yet there ought to be some further proof to establish entirely the execution and validity of a recited deed. A bare recital of the deed, it has been said, is not evidence, but taken in connection with other facts which corroborate the recital, or where there is other evidence that the instrument recited existed, then the recital may be taken as evidence both of its existence and execution.[4]

§ 173. **Presumptions.**—In the absence of any direct evidence, presumptions may sometimes be resorted to, particularly where the importance of the fact is inconsiderable, or the circumstances exist which raise a presumption in law.

[1] Lee on Abst. Tit. 360, 361.

Lee on Abst. Tit. 361.

[3] *Ibid.* 363.

[4] Burnet v. Lynch, 5 B. & C. 601.

Some presumptions are founded on lapse of time, others on common experience.

"In the case of births and marriages many facts may be adduced in support of the presumption of one from circumstances connected with the other; for instance, the birth or baptism of a child being proved gives much weight to to presumption of marriage between the parties whose child it is stated to be, if the evidence is derived from the common register, where it is stated to be the child of particular parents named as usually in the books. Proof of a marriage prior to the time of the birth of a child affords ground for presuming that such child is the issue of the parties so married, if the mother be known; and where a birth is proved a short time only after the marriage, the probability that it is the eldest child of the marriage amounts almost to certainty, but the possibility of there being a twin birth in such a case may prevent absolute certainty. Where a child is born several years after the marriage it is more difficult to prove an eldest or only child."[1]

"In regard to marriages, there are many grounds for raising a presumption of marriage in the absence of direct evidence of the fact. The parties having always lived together as man and wife, and having in common reputation been received by their friends as such: children being described as children of A and B his wife; their so styling themselves in wills or deeds; and other matters less important than these, if ancient in date, have been allowed to raise the presumption of marriage in common cases.[2]

It has been found by common experience to be a necessary presumption that a person of the same name and conveying the same interest as that limited to a person previously mentioned, is the same person; unless circumstances exist which render this improbable, or at least, have that tendency. A great interval existing between any two deeds, or the fact that the last deed was not recorded

[1] Lee on Abst. Tit. 464.
[2] *Ibid.* 465.

for some years after it purports to have been executed, are circumstances which suggest the propriety of calling for evidence of identity. And where a deed was executed in a foreign country, during the progress of an investigation for quieting title, satisfactory evidence of identity and execution were required.[1]

Sealing also, though of the essence of the deed will be presumed, and that not only in cases where the deed is lost or torn, but also where no mark or impression on the parchment or paper appears, provided the attestation notice the solemnity of sealing to have been complied with. The reason is, that to constitute sealing the use of wax is not essential; it is sufficient if the seal be impressed by the party on the plain parchment or paper with an intent to seal, without making or leaving any impression or indentation.[2]

In like manner the delivery of a deed will be presumed, if found in the grantee's possession. But presumptions, it is to be remembered, may always be controlled by evidence.[3]

The law never makes a presumption that acts are improperly done, or that fraud has been committed, unless there is good ground for believing such to be the fact; presumptions, if made where nothing is known, are always that things are rightly done, or in favor of order and regularity.[4] In accordance with this presumption it is not usual for counsel to require proof of the genuineness of the instruments, or of the signature or attestations attached to them, nor of the actual payment of purchase money recited to have been paid, nor as to the competency or sanity of any of the parties, unless there are circumstances suggesting doubt on the subject. In which case, however, it is his duty to insist upon proof of such character and degree

[1] Taylor on Titles, 137.

[2] Coventry on Conv. Ev. 21; Martindale on Conv. (2d ed.), 166, and cases cited.

[3] Martindale on Conv. (2d ed.), 184.

[4] Lee on Abst. Tit. 465; Coventry on Conv. Ev. 319.

as common discretion may dictate. The question determining his action in the matter would be, is there such a degree of uncertainty apparent upon the transaction, taking into consideration possible as well as probable circumstance, as would naturally raise suspicion in the mind of an unprejudiced person. If that degree of doubt and suspicion does attach, it devolves upon the vendor to clear it up.

In the absence of all proof or knowledge of facts there can be no presumption except what the law itself points out. In some cases an inference may be made from nothing being known to the contrary for a series of years.

In any case of alleged quiet possession or of no claim made, there can be no presumption where there is no knowledge, except such as can be drawn from acquiescence or apparent acquiescence in the title of the property in possession; thus, where no adverse claim has been heard of for a length of time, quiet possession may be inferred or presumed.[1]

Where a person has not been heard of for a number of years, it is the practice in courts of law to presume his death after seven years, but a seven years' absence without tidings is not sufficient to raise this presumption with conveyancers.[2] Every case must depend upon its own particular circumstances, and no certain period can be fixed which will raise the presumption. Scarcely any length of time will be sufficient to compel an unwilling purchaser to take a title depending on such a presumption of death, unless made with reference to the age of the party said to be dead; and if the party whose death is asserted was, when last heard of, very young, the period must be that beyond which human life does not commonly extend. If the presumption to be made is death without issue, it is doubtful if a court would, as against a purchaser, ever make a presumption within the period of sixty years.[3]

[1] Lee on Abst. Tit. 466.
[2] Dart on Vendors, 315; Taylor on Titles, 142.
[3] Lee on Abst. Tit. 466.

§ 174. **Voluntary Affidavits.**—Voluntary affidavits are frequently resorted to, and required by conveyancers under a choice of difficulties, in support of facts and averments, when more direct proof cannot be obtained.[1] These documents, though possessing no legal validity; are often all the evidence that can be adduced; and as it were by general consent the profession adopted them as evidence upon titles.[2]

As legal evidence such affidavits are clearly inadmissible; they are purely voluntary, and not being made in court in any cause, they will not sustain an action for perjury; then they are made expressly to support some point, and are, therefore, on the face of them, not of that pure and disinterested character which is expected from unexceptional evidence; and they frequently contain nothing more than hearsay evidence; yet the conveyancer admits this testimony as corroborative evidence of general reputation and concurrent possession.

It should always appear on the face of the affidavit that the deponent is likely to be acquainted with the facts and reasonable ground for his belief should be stated.[3]

Affidavits are seldom resorted to in this country in support of titles, though circumstances occasionally arise in which no better evidence can be adduced.

§ 175. **Circumstances Suggesting Suspicion.**—Attention has heretofore been called to the fact that it is impossible, in many cases, that the records should be an entirely safe reliance, because many things that may affect a title cannot be shown by them, such as heirship, dower and curtesy, possession of the premises, or the disability of a grantor or fraud of the grantee which may render any of the instruments in the chain of title void or of no effect.[4] If such extrinsic inquiries have not been made and set out

[1] Coventry on Conv. Ev. 319.
[2] Lee on Abst. Tit. 215; Hobback on Suc. 66.
[3] Taylor on Titles, 136; Coventry on Conv. Ev. 319.
[4] *Ante*, ch. IV.

in the abstract, it is the duty of counsel to call for information in respect to the same, as often as the circumstances may suggest any such inquiry. It is always important to inquire into the possession of the premises, and if the land is found to be unoccupied, or to have been recently taken possession of, after having lain dormant for a number of years, this fact will put the purchaser upon his guard— particularly if the taxes have not been paid regularly or a tax title has been acquired upon the property during that time— as unoccupied lands which have not been looked after by the owner are more likely to be selected for fraudulent conveyances, because the probabilities of concealing the fraud will be greater. If one or more deeds of ancient date have been recently placed on record and are not produced, or if the parties grantor or grantee were non-residents, or their place of residence indefinitely described, or the immediate grantor is a stranger in the community, or is represented by an attorney in fact, these circumstances will suggest additional caution. The death or disability of the owner and subsequent registration of a deed from him is a circumstance suggesting suspicion also. In a paper read before the American Bar Association on "The Recording Laws of the United States" Judge Cooley said: "In looking for land to appropriate, the land robber will be likely to come across cases in which, on the death of the owner, it is manifest the knowledge of his ownership has not immediately been brought home to the heirs. Such instances generally happen in the case of non-residents. A large proportion of the community never make inventory of their property, and if they attend in person to their own affairs, they may have lands abroad of which their families have but faint information, and sometimes none at all. Very many of the tax titles in the western States originate in the fact that for a time after the death of the owner the lands are not looked after, either for lack of information on the part of those interested, or because the family are infants and women, and

their affairs pass to the hands of some one who was a stranger to the business of the ancestor, and only slowly possesses himself of a knowledge of the facts. During this period there is opportunty for a fraudulent harvest, and when the representatives of the deceased at last inquire out the lands, they find that apparently the ancestor disposed of them in his life-time, and the inquiry goes no further. * * *

"To carry on frauds on a large scale, confederates are required, and several transfers may be desirable. And the fraudulent dealings will by no means be confined to the cases of death or disability of the owner. Those are generally the safer cases; but many non-resident owners of land in the western States have never visited them, and if false deeds were placed upon record only a fortunate accident would be likely to acquaint them with the fact.

"Fraudulent deeds are sometimes obtained by a species of false personation, which all parties concerned appear to think may be indulged in without danger. For example, Mr. William Jones, of Wisconsin, many years since purchased of the United States a certain quarter section of land, and there is no conveyance of it by him of record. Another Mr. William Jones, of Milwaukee, receives a letter from a land agent, inclosing ten dollars and a quitclaim of this land, which he is requested to execute. He does not preceive what good the quitclaim can do any one; but, confident it cannot hurt him to consent, he gives the conveyance and accepts the money. Now the deed of quitclaim in common use in the western States is really a deed of bargain and sale, and just as effectual in transferring the title as the common deed with covenants. And in several States it has been decided that no suspicion attaches to a title by reason of its having been transferred by a quitclaim.[1] The land agent, therefore, soon disposes of the

[1] See McConnell v. Reed, 4 Scam. 117; Butterfield v. Smith, 11 Ill. 485; Pettingill v. Devin, 35 Iowa, 344; Burns v. Berry, 42 Mich. 176; Morris v. Daniels, 35 Ohio (N. S.), 406; Taylor v. Harrison, 47 Tex.

land to a *bona fide* purchaser, whose title is apparently good and may never be disproved.

"One other fraud, of which cases have come before the courts, may be mentioned. Very generally in this country it is now provided that a homestead shall only be conveyed by the joint deed of a husband and wife. A husband, whose wife by misconduct has been driven from his home, has been known to procure an abandoned woman to personate her for the purposes of this conveyance; and when, after the husband's death, she attempted to claim homestead rights, this deed, certified in due form by a public officer to have been executed by herself, confronted her. In case she had died before the husband, and the minor children had claimed the homestead, the fraud would have been likely to be completely effectual."

Alterations and interlineations in a deed, although they may excite suspicion as to the correctness of the instrument, cannot alone be ground for invalidating it, but counsel scrutinize such instruments with special care, and where there is anything in the appearance of the deed, or the nature of the interlineation, to confirm suspicion, proof should be required that the interlineation was made before the delivery, or that the instrument has been re-delivered subsequent to such alteration, so as to take effect as a new deed.

A signature by a marksman also calls for special care on the part of examining counsel.

And where deeds have been executed by power of attorney it is important to ascertain that the principal was alive when the deed was executed, as the power would be revoked by his death.

§ 176. **Analysis of the Abstract.**—Directions as to the mode of proceeding in the perusal of an abstract can be of little service, inasmuch as different minds employ different

454. But see also Marshall v. Roberts, 18 Minn. 405; Hutchinson v. Harttmann, 15 Kan. 133.

methods, and the practioner will adopt those best suited to his professional habits, independent of any set rules. A few general observations on this subject, however, cannot be out of place in a work like the present.

It is presumed that every person who habitually peruses abstracts keeps some memoranda of their contents. An abstract book is desirable, not only as an assistance in the perusal, but also for the purpose of reference on future occasions. "Counsel should not incumber himself with any unnecessary details, still he may save himself much unnecessary labor by a little method, and by writing his opinion with his notes in a book as he proceeds, reserving, if necessary, any important point for subsequent consideration."[1] It is suggested by Mr. Sugden that the perusal should, if the length of the abstract will permit of it, be finished at one sitting, and that the abstract should be perused but once, and that once effectually. These remarks, we conclude, are intended to apply only after a preliminary survey has been made of the title. We apprehend that most persons will find it less laborious and more conducive to a thorough comprehension of the true state of the title to first make a general survey or skeleton analysis of the contents of the abstract, embracing the names of the parties to each transfer, and to trace the description of the parcels through each successive step, without the mind being distracted with other injuries. If no break in the title is thus disclosed, a critical examination of each link in the chain may then be taken up and disposed of *seriatim*, noting on the analysis any defect or matter upon which further evidence or information is desired. The points to which attention is to be drawn in such examination have been discussed under the heads of the several modes of transfer respectively.

§ 177. **In Summing up,** the nature of the contract between the parties will of course be considered, as conditions of sale, or special agreements under which a purchase is

[1] Sugd. on Vendors (Am. Ed.) 10.

made, often contain very important stipulations, materially varying the rights of purchasers in regard to matters of title. In respect to the contract attention is to be directed: 1. To the lands which are purchased. 2. To the degree of interest which the purchaser is to acquire. 3. Whether he agrees to accept the title without the production of any of the instruments or proof of any fact supporting the title. 4. Whether he is to take the title subject to any incumbrance or other circumstance affecting the value or subsequent enjoyment of the estate purchased.

There is no point of more practical importance than identity of parcels, to which we have before referred. Parcels are oftimes so generally stated at the commencement of an abstract, and many of the descriptions comprised in the deeds themselves are so vague and indefinite, that a vendor himself may occasionally be deceived as to his own property, and be quite unable, by authenticated evidence, to make out a clear statement of what is, and what is not comprised in his title. Under such circumstances some attention is required to see that the regular chain is kept up; and care is particularly required where there are undivided interests or irregular subdivisions. Sometimes plats of premises may be resorted to with great advantage.

The degree of interest which can be obtained in the land is frequently one of the most difficult points to determine. It will sometimes be necessary to decide whether a person has a legal or equitable estate; whether an interest is an equitable estate, or merely a power or authority; a vested or contingent remainder, or an executory devise; whether he be a tenant for life or in fee; whether he be a joint tenant or tenant by entirety. So it is frequently necessary to decide whether an estate which existed has been discontinued or turned into a right of entry; or whether an estate has been merged into an estate of higher degree.

The relative character of the parties and their competency to have carried on the title by means of the documents abstracted must also be considered. The mind

should revolve upon the situation and character of the grantors, that it may form correct conclusions whether the various owners were invested with the titles which they purport to convey and were legally competent to convey the same.

It frequently becomes necessary to consider whether documents which cannot from some informality operate as they were intended, may not still take effect in some other mode, so as to meet the wishes and intention of the parties and support the title as intended to be deduced. A release may operate as a grant, or a grant as a release, An assignment may be a lease or under-lease.[1]

So a charge affecting land may sometimes be created without words expressive of a grant. Thus, a covenant or reservation may amount to a grant and a covenant to pay a certain sum of money out of the land may amount to a mortgage; or an instrument in the form of a deed may operate only as a testament, as where a voluntary settlement is made, and the settler reserves to himself a life interest and a power of revocation, or never parts with the deed.[2]

Questions involving the doctrine of notice, both actual and constructive, constantly arise on abstracts of titles also, and the law makes it imperative upon the purchaser to follow up any inquiry suggested, by charging him with the knowledge to which such an inquiry would have led.

In order to deduce a perfect title the abstract should show a deduction of the title to the legal estate; that the legal estate is free from any equities affecting it; that all the particular estates are either determined or conveyed to the vendor and no reversion or remainder is outstanding, and that there are no incumbrances. It is to be observed, however, that a title may be perfect, so far as not to be open to a successful claim by a third party, and yet at the same time not be supported by legal evidence. Moreover,

[1] Lee on Abst. Tit. 268.
[2] *Ibid.* 268, 269.

the question to be determined by counsel is not always whether the title disclosed by the abstract is perfect, or whether it is absolutely free from all chances of eviction or adverse claims, but frequently he will be called upon to decide whether it is such a title as the purchaser, under the terms of his purchase, can be compelled to accept, or whether the title is doubtful to such a degree as to render the purchase inexpedient, where the object is speculation or the acquisition of property more or less desirable at the price at which it is offered. In the latter case the question will be determined, of course, by the circumstances of the particular case. But whether slight defects are of sufficient importance to render the title doubtful and unmarketable to the degree that it cannot be forced upon an unwilling purchaser will afford abundant occasion for research.[1]

In the absence of stipulations to the contrary, a purchaser is entitled to demand such a title as will enable him not only to hold the land but to hold in peace, and if he wishes to sell it, to be reasonably sure that no flaw or doubt will arise to disturb its marketable value.[2]

Whenever the abstract fails to set forth all the facts material to the title, or apparent discrepancies exist which are unexplained, counsel will, of course, call for further information until he is satisfied that he has the true state of the title before him, as fully as may be practicable. The English practice of making formal requisitions upon the solicitor of the vendor in such cases, has not been generally adopted in this country, but may sometimes be resorted to with advantage.

§ 178. **The Certificate of Opinion.**—In certifying his opinion upon an abstract, counsel should avoid directing attention to any mere technical irregularity not affecting the title, while on the other hand, he should not fail to point out any substantial defect or possible contigency

[1] A collection of cases in which defects have been held sufficient to render titles unmarketable will be found in a note to Cornell v. Andrews, 15 Cent. L. J. 8.

[2] Cornell v. Andrews, *supra*.

upon which a serious question might arise. The extreme caution of some members of the profession not unfrequently leads to the suggestion of numerous objections which are practically of no consequence and merely create confusion. The client is as much at sea after receiving an elaborate opinion as he was before. But while the opinion, and not the process by which it is reached, is the object sought, yet should there be any grave doubt or possibility that the title might prove defective, the client has a right to know the exact state of the facts or circumstances and the law bearing upon them, and no counselor possessed of ordinary prudence will fail to set forth in his opinion the ground of any such doubt and the contingency upon which it depends. And where any apparent defect has been cured by lapse of time, or by some statute, or otherwise, the fact should be noted in order to show that the question has received due consideration. A form will be found in the appendix.

CHAPTER XVIII.

LIABILITY OF EXAMINERS OF TITLES.

SECTION:

§ 181. **Nature of the Liability.**—The liability for want of skill, or ordinary care and diligence, of persons who engage in the business of searching records, examining titles and preparing abstracts, for compensation, is well established.[1] But as to the nature of the liability thus assumed the authorities have not been altogether in harmony. It appears to be settled, however, that the contract is not one of indemnity, but merely an undertaking that he will faithfully and skillfully perform his work. The foundation of an action of damages for a breach thereof, is the implied promise to perform with care, diligence and sufficient skill, the duty undertaken for the compensation agreed upon.[2]

[1] Story on Bailm. § 431; Wells on Attys. 285; Wharton on Neg. 749; Sher. and Red. on Neg. 211.

[2] Dodd v. Williams, 3 Mo. App. 278. The cause of action arises, if at all, when the certificate of title is delivered, and the statute of limitation commences to run from that date. Rankin v. Sheaffer, 4 Mo. App. 108.

In the case below cited [1] it would seem from the language employed by the court that the contract was regarded as one of indemnity. But in a later case the same court distinctly disaffirms that doctrine.[2] A late decision of the Supreme Court of Illinois, holds that persons engaged in the business of making abstracts of title occupy a relation of confidence to those employing them, and should be held to a strict responsibility in the exercise of the trust and confidence reposed in them.[3]

§ 182. **What will Constitute Actionable Negligence.**—It has been held that where a party undertakes for a valuable consideration to furnish another with an abstract of title, or statement of the conveyances and incumbrances affecting a tract of land, and incorrectly reports the quantity of land previously conveyed, he will be liable to respond in damages to the party who, relying upon such information, purchases the land.[4] So where a party employed to examine the records and make an abstract of the title to certain real estate, omitted to note the fact of a judgment and sale of the land for taxes, of which the purchaser was ignorant until the time of redeeming had expired, whereby he was caused to pay out money to remove the cloud upon his title, it was held that the party making the abstract was liable in damages to the purchaser for the sum so paid by him to remove the cloud.[5] In defense to the above, it was

[1] Page v. Trutch (U. S. C. C. Oregon), 8 Chicago Leg. News, 385. "The certificate is not to be considered a warranty against every frivolous and speculative question which the dishonesty of the debtor or the ingenuity of counsel may interpose against the enforcement of the security; but I think it ought to be held as a warranty or representation, not only that the mortgage would be found or held to be valid at the end of a protracted and expensive litigation, but that there was no palpable grave doubt, or serious question concerning its validity."

[2] The Dundee, etc. Co. v. Hughes, 18 Cent. L. J. 470.

[3] Vallette v. Tedens, 122 Ill., 607.

[4] Clark v. Marshall, 34 Mo. 429.

[5] Chase v. Heaney, 70 Ill. 268. The plaintiff procured of defendant an abstract of title for a tract of land, which had been sold on execution and the abstract erroneously showed that plaintiff had ten days more in which to redeem than she actually

contended that the evidence failed to show that at the time the search was made the judgment was of record: but the court held that, in the absence of proof to the contrary, it would be presumed the officers of the court did their duty, and promptly made a record of the judgment and sale. It was also contended that it did not appear from the evidence that the appellants agreed to furnish a complete abstract of all that appeared upon the records relating to and in any way affecting the title to the property. To which Scofield, J., in delivering the opinion of the court, says: "The evidence shows ahat the appellants held themselves out to the public as being engaged in the business of searching the public records, and making abstracts of titles for compensation; that appellee requested them to make an abstract of the title to his property, and paid them the compensation which they charged therefor, and this is all that was necessary for the purpose of the present suit. Nor do we consider that it was competent for the appellants to limit their liability by an obscure clause in their certificate appended to the abstract, without especially calling the appellee's attention to it. They undertook to furnish him an abstract of what appeared upon the public records affecting the title to his property, and he was authorized to rely upon their competency and fidelity in this respect. When, therefore, they discovered that they could not furnish him with a complete and reliable abstract, it was their duty to notify him of the fact, so that he might apply else where."

had; but she discovered the error some time before the year for redemption had actually expired. She could not have redeemed without borrowing money. The land was worth considerably more than the amount required to redeem, but she failed to make redemption, and in this action seeks to recover her damages on the ground that she relied on the abstract and was misled thereby. It was held that the jury would not have been justified in finding that the error in the abstract was the cause of her failure without some evidence to show that she could not, with reasonable effort, after the discovery of the error, have redeemed within the time allowed. Roberts v. Leon Loan & Abstract Company, 69 Iowa, 673.

§ 183. **Liability of Officers Making Official Searches.** In some of the States it is the practice for the examiner after having ascertained the chain of title by inspection of the records, to direct written requisitions to the clerks of the various offices for searches for incumbrances or liens of record that may affect the property. In large cities this method is rendered necessary, or at least convenient, in order to avoid the throng of applicants which would otherwise crowd the offices, and also to prevent the subjection of the records to the carelessness or fraudulent designs of the searchers. In a few of the States it is made the duty of recording officers to search their records, upon application, and give certificates as to the chain of title to any specific real estate therefrom. The liability of all such officers is either fixed by statute or is established under the general law of negligence. They are also liable for the acts or omissions of those whom they delegate to do the work.[1] Thus, the plaintiff, intending to purchase certain real estate in the city of Brooklyn, employed the defendant to search for taxes and assessments upon the premises. The defendant afterwards delivered to him two returns, one being a search for taxes, certified by the defendant, and the other a search for assessments, certified by a third person, not employed by the plaintiff, and received the usual fees for both searches, with an additional sum for expediting them. The plaintiff completed his purchase, on the faith of these returns, receiving a deed containing a covenant against assessments and incumbrances. An assessment upon the property, for street improvements, not disclosed by the search, was afterwards discovered and paid by the plaintiff. It was in the name of one who owned the property when the proceedings were commenced, but not the owner when the assessment was confirmed or the search was made. There was no evidence that the commissioners were notified of the change of own-

[1] Gerard's Titles to Real Estate, 757; Kimball v. Connolly, 33 How. 247.

ership, nor was there any evidence as to the responsibility of the plaintiff's grantor. The court held that the evidence authorized the jury in finding the defendant responsible for negligence in the search for assessments; that the assessment paid by the plaintiff was valid, and a lien at the time it was paid; and that the covenants in the plaintiff's deed furnished no defense, the burden being on the defendant to show, and he had failed to show, that they had preserved, or were available to preserve the plaintiff from damages or loss.[1] In Pennsylvania it is a part of the duty of a prothonotary to make searches and give certificates of the liens of judgments, and his sureties are liable for damages incurred by a purchaser of the land, through a mistake in the certificate of judgments; and it is immaterial that there is no seal attached to it, and that there is no proof of payment of the fee.[2] So a recorder of deeds and mortgages giving a certificate that he has searched and could find no mortgage, and charging and receiving the fee allowed by law, is liable on his bond if it afterwards appears there was then a mortgage on record by which the party obtaining the search is prejudiced.[3] But where the bond was merely "to deliver up the records and other writings belonging to said office, whole, safe and undefiled, to his successor therein, according to law," the sureties were held not liable for false searches.[4] The officer is not bound to make an examination in the sense of passing upon the legal effect of the instrument, but merely to give information as to what is of record.[5]

§ 184. **The Liability of an Attorney for Defective Advice** as to titles is the same whether the adviser ranks as a conveyancer or as counsel. If he assumes to act as coun-

[1] Morange v. Mix, 44 N. Y. 315.

[2] Zeigler v. Commonwealth, 12 Pa. St. 227.

[3] The securities are liable on the bond for all that the principal is. McCarahan v. Commonwealth, 5 W. & S. 21; Houseman v. Girard L. & B. Ass'n, 81 Pa. St. 256.

[4] Commonwealth v. Harmer, 9 Phil. 90.

[5] Lusk v. Carlen, 5 Ill. 395.

sel, and accepts a fee therefor, he will be responsible for his opinions. An attorney, however, is not bound to perfect accuracy or perfect care;[1] but if through his carelessness, or that of his clerk, loss ensues, he is liable.[2] Thus, although relief may be given at the suit of a client against his solicitor for loss sustained by reason of negligence, yet where the loss was in respect to a matter of conduct as to which the advice of the solicitor was founded on the opinions of competent surveyors as to the value of the property, and those opinions submitted to the judgment of the client, the court dismissed the bill.[3]

But where the attorney of the vendee of an estate was employed to investigate the title thereto, and in taking the opinion of counsel thereon, omitted to mention certain instruments materially affecting the title, and upon the faith of the opinion given—which would have been different had the instruments been mentioned—the attorney was held liable for the damage occasioned by his negligence.[4] Where the client himself has made inquiry, and leads his attorney to believe that he is satisfied in reference to any matter of fact in question, whereby the attorney is lulled into a false feeling of security, he may be excused from a charge of negligence.[5] But great caution should be exercised in relying upon representations made by a client, as the tendency among such is almost universally to depreciate the importance of thorough search, in order, in many instances, to lessen the fee of the attorney. The facts which are held sufficient to absolve an attorney from the duties and liabilities imposed upon him, and the benefit of which is the object of his employer to secure, should be very strong, and will be for a jury to determine.[6] Where an attorney

[1] "He is not expected to anticipate rulings overturning the law as it existed when he gave his opinion. It is sufficient if he accepts the law accepted by good professional men." Weeks on Attorneys at Law, 520.

[2] Weeks on Attorneys at Law, 520, and authorities cited.

[3] Chapman v. Chapman, 9 L. R. Eq. 276.

[4] Ireson v. Pearman, 5 Dowl. & R. 687.

[5] Waine v. Kempster, 1 F. & F. 695.

[6] See State v. Leach, 6 Me. 58. Where the party applying to the re-

was employed by a client who proposed to advance money on the security of a legacy given under a will to the borrower, it was held that the attorney was not justifiable in relying upon a partial extract from the will furnished by his client, unless the latter agreed to take the responsibility upon himself.[1] In this case the court says: "The complaint is, that Mr. T. did not go to the Commons and examine the will itself. I am of opinion, that by law it is the duty of an attorney not to content himself with a partial extract from a will, unless something pass between himself and his client which shows that it is unnecessary to consult the original." How far an attorney would be justified in relying upon a partial or incomplete abstract furnished him by his client, without having recourse to the records and documents themselves, is a matter yet to be determined.

§ 185. **To Whom the Liability Extends.**—The drift of authority seems to be in favor of the proposition that the liability of an examiner of titles for want of skill or ordinary care and diligence is to the party who employs him alone, and that an action of damages cannot be sustained by a third party acting upon the faith of the certificate.[2] But if fraud or collusion was shown to exist between the examiner and the person who employed him it would seem to be otherwise.[3] And although the examiner is liable only to the person who employs him, he may, by affirming the

corder for a certificate as to incumbrances, stated that he knew about an attachment upon the land, that it did not amount to anything, and that he desired the certificate for his own use, whereby the recorder was induced to give a clear certificate. *Held*, misconduct, which properly subjected the officer to removal.

[1] Wilson v. Tucker, 3 Stark. 154.

[2] Housman v. Girard Etc. Association, 81 Pa. St. 256; Commonwealth v. Harmer, 9 Phila. 90; Hood v. Fahnstock, 8 Watts, 489; Brocken v. Miller, 4 W. & S. 110; Savings Bank v. Ward, 100 U. S. 195; The Dundee, etc. Co. v. Hughes, 18 Cent. L.J. 470 and note. But see Donaldson v. Haldone, 7 C. & F. 762; Page v. Trutch, 8. Chicago Leg. News, 385.

[3] Housman v. Gerard, etc., 81 Pa. St. 256; Savings Bank v. Ward, 100 U. S. 195.

correctness of his certificate to another, become liable for a mistake therein to such other person.[1]

In Savings Bank v. Ward, above cited, Mr. Chief Justice Waite, with whom concurred Justices Swayne and Bradley, delivered a dissenting opinion, upon the ground that it appeared that the examiner gave his client the certificate in question with knowledge or reason to know that he intended to use it in a business transaction with a third person, as evidence of the facts contained therein, and was, therefore, liable to each person for any loss resulting from a reliance on such certificate in any particular which might have been prevented by the exercise of ordinary care and skill on his part.

This is a very important question touching the liability of examiners of titles where the practice is for the vendor to procure the abstract and cause the requisite searches to be made, inasmuch as the vendee is, ordinarily, the only one liable to be damnified by any mistake or inaccuracy in the abstract.

§ 186. **Actual Damage Must be Shown to Support an Action.**—To sustain a claim of damages, it must appear that actual damages were sustained, by reason of the negligence complained of.[2] If no money is advanced on the faith of the examiner's certificate; as where, at the time of the examination, the property had already been bought and paid for, there can be no recovery for a failure to report an incumbrance; nor where the judgment omitted in the certificate is voluntarily paid and satisfied of record by the purchaser. The defendant may show that the person against whom the judgment was rendered, had, at the time the judgment was paid by the plaintiff in the damage suit, other unincumbered real estate in the county, sufficient to satisfy the judgment. So, where the existence of the lien omitted in the abstract can be material to the purchaser only by reason of an understanding between him and his

[1] Sievers v. Commonwealth, 6 Week. Note. Cas. 17.
Kimball v. Connolly, 42 N. Y. 57.

grantor, of which the examiner was ignorant, and by reason of which a deed, appearing upon the its face to be absolute, was held to be a mortgage, no action will lie.[1]

[1] Roberts v. Sterling, 4 Mo. App. 593.

NOTE.—The substance of the foregoing chapter has heretofore been published as a magazine article in 15, Cent. L. J., 482.

APPENDIX.

FORMS.

Abstracts, as commonly prepared in different sections of the country, vary in many respects in point of form, and in some essential particulars. Thus, in some localities, an abstract is little more than an index to the conveyances; in others the mere certificate of the examiner as to the state of the title is more frequently made to serve the purpose, while in others abstracts are more or less elaborately prepared, according to the local practice.

The system of tenures under which lands are held in England and Canada, requires a somewhat different arrangement of the abstract from what is required in the United States, where the title to all lands is allodial. Under the English system, abstracts are arranged more especially with reference to the history of the ownership of the land.

For the following illustration the writer is indebted to Messrs. Abbott, Tait and Abbott, advocates, of No. 11 Hospital street, Montreal.

ABSTRACT.

OF THE TITLE OF JOHN SMITH.

I.—DESCRIPTION.

To the property situated on St. James street, in the City of Montreal, and known as number in that street, being lot num-

ber on the official plan and in the Book of Reference for the Registration Division of Montreal West.

II.—BOUNDARIES.

It is of irregular form, and is bounded as follows:

In front fifty feet by St. James street, to the east one hundred and seven feet by the property of A. B., to the west one hundred and nine feet by the property of C. D.,and in rear forty-nine feet by Fortification lane.

III.—TENURE.

The tenure is that of franc alen roturier. The seigniorial dues have been commuted by deed before E. T. Notary Public, passed on the day of 188 , between William Brown, the vendor of the said J. S., and the Ecclesiastics of the Seminary of Montreal.

IV.—TITLE OF PRESENT OWNER.

It is held by John Smith under the following deed:

Deed of sale from William Brown before W. W., Notary Public, dated the 12th day of August, 1881, for $30,000, whereof $10,000 were paid in cash at the making of the said deed, and the balance is due under the conditions of the deed on or before the first of January, 1890. The property being hypothecated for the balance at 7 per cent. by bailleur defonds privilege. To this deed intervened Dame Margaret Wilson, wife of the said William Brown, who declared that she released and abandoned all the claim she might have to dower out of said property.

V.—TITLE OF THOSE HE REPRESENTS.

His author held the same in the following manner:

John Willis acquired the property more than thirty years ago, namely, in 1850, under his father's will, executed in English form on the 10th of June, 1849; a probate whereof was granted by the Prothonotary of the Superior Court at Montreal on the 18th of November, 1849. The will left the usufruct of the property to John Willis for his life and a substitution in favor of his children, Richard and John Willis, then minors, the younger of whom came of age in 1865.

In a suit of the Bank of Montreal against John Willis, No. 1804 of the Records of the Superior Court at Montreal, this property was sold and adjudicated to William Brown on the 18th day of June, 1875.

In 1876 by deed passed before X. Y., Notary Public, Richard and John Willis released to the said William Brown for considerations mentioned in the deed all their right, title and interest in the said property.

VI.—MATRIMONIAL RIGHTS.

The property is affected in this respect in the following manner:

John Smith was married on the 17th of April, 1872; by contract before W. W., Notary Public, of date the 6th of April, 1872, it was stipulated

the parties should be separate as to property, and that no rights of dower should attach.

VII.—INCUMBRANCES.

The certificate of the Register of the Registration Division of Montreal West, upon this lot, dated the 20th of June, 1885, shows the following two incumbrances:

1st. Bailleur defonds claim, $20,000 with interest at 7 per cent. due in 1890, reserved by deed of sale by William Brown to John Smith, before W. W., Notary Public, dated 12th day of August, 1881.

2d. Hypothec for $5,000 with interest at 6 per cent. in favor of the Montreal Loan and Mortgate Company, under deed of mortgage and hypothec before W. W., Notary Public, dated 13th of August, 1881.

Very excellent authority can be found among practitioners, in this country, for the use of more abridged forms than are recommended in this work, in which the distinguishing features of the records and documents are set forth, together with the particulars of the transfer; but without reference to the formal parts of any instrument, unless it be defective in form—silence in regard to formal requisite implies that the same is in due form of law. Such abstracts are usually confined also to matters appearing of record.

The following is an example of this mode of preparing abstracts, and is the form commonly adopted in Chicago and many other portions of the country:

(*ABRIDGED FORM.*)

EXAMINATION OF TITLE.[1]

TO

BLOCK 1 AND 2 OF JOHNSON'S SUBDIVISION OF THE W. ½ OF THE S. W. ¼ OF SECTION 12, TOWNSHIP 00, NORTH, RANGE 00, EAST OF THE 3D P. M.

	Receiver	Receipt No. 200, dated June 13, 1835.
1.	to	Filed December 14, 1835.
	Samuel Scott.	Recorded in book K, page 43.
	Doc. 2,113.	Acknowledges receipt of $100.00 in full

payment for the W. ½ S. W. ¼ Sec. 12, T. 00, R. 00, E. of 3d P. M. = 80 acres.

	United States	Patent, dated October 1, 1839.
2.	to	Not recorded in Cook County, Illinois.
	Samuel Scott.	Grants same land.
	Samuel Scott and	Warranty Deed,[2] dated July 2, 1840.
	Fanny, his wife,	Filed July 15, 1840.
3.	to	Recorded in book D, page 277.
	William Jones.	Consid. $300.
	Doc. 4,200.	Conveys same land.

Certificate of acknowledgment dated July 2, 1840, by Justice of the Peace, Cook County, Illinois, does not state that contents of deed were made known to Mrs. Scott.

[1] Various words have been substituted in different localities, and by different abstractors for the heading or title, in place of the word abstract, such as "examination," "search," "brief," "survey," "chain" of title, etc.; all of which are practically synonymous with abstract, unless it may be where the words have acquired a special and local meaning, as distinguishing different degrees of thoroughness. Abstract of Title, is the technical term, and for that reason is, perhaps, preferable to any other.

[2] The character of the instrument should be taken from the whole document and not simply the heading. Warranty deed is understood to mean a deed with full covenants.

	William Jones	Deed, Dated May 27, 1845.
4.	to	Filed June 16, 1847.
	William H. Gardner.	Recorded in book 24, page 1.
	Doc. 7,460.	Consid. $1.

"Grant, bargain, and sell," etc., all of W. ½ S. W. ¼ of Sec. 12, aforesaid.

Contains covenants of warranty against all persons; excepting a cer-"tain mortgage for the sum of $1,000, executed by the grantor herein "to James Adams, dated March 1st, 1841, and recorded in book W, at "page 146."

NOTE:—The above mentioned mortgaged was released on the margin of the record thereof by the mortgagee June 20, 1846.

	William H. Gardner	Quitclaim Deed, dated January 10,
	and Mary, his wife,	1846.
5.	to	Filed June 20, 1847.
	George W. Samuels.	Recorded in book 24, page 10.
	Doc. 17,600.	Consid. $1.

"Remise, release and quitclaim" the W. ½ S. W. ¼ Sec. 12, aforesaid.

Certificate of acknowledgment dated January 1846.

	George W. Samuels	Mortgage, dated May 4, 1850.
6.	to	Filed May 10, 1850.
	John W. Johnson.	Recorded in book S, of mortgages, page
	Doc. 19,700.	46.

To secure payment of $4,500, payable in two years from date, with interest at 8 per cent. per annum.

Conveys the land described in the caption hereof.

	John W. Johnson	Assignment, dated August 8, 1851.
7.	to	Filed September 1, 1851.
	Abram Johnson.	Recorded in book 1, of mortgages, page
	Doc. 26,320.	100.

Sells, assigns, etc., a certain indenture of mortgage, dated May 10, 1850, made by Geo. W. Samuels to said as-

signor, together with the bond or obligation therein described and the money due and to become due therein, which said mortgage is recorded in book S, of mortgages, page 46.

In the Circuit Court of Cook County.

Abram Johnson,	}	Case No. 5000.
S. v.		In Chancery.
The unknown heirs of Geo. W. Samuels.		Bill to foreclose mortgage given by Geo. W. Samuels to John W. Johnson, (No. 6, above) filed January 18, 1855.

Sets forth the execution of said mortgage and the bond therein mentioned; the assignment of said mortgage August 7, 1851, to complainant; that the bond and mortgage was payable at a day long since past, the last payment having been due May 10, 1852; that the said George W. Samuels died about the year 1853, leaving heirs entirely unknown to complainant; that the said sum of money and the interest thereon described in said bond and mortgage still remain unpaid.

Prays that an account be taken and that the unknown heirs of said George W. Samuels be decreed to pay the amount found due to complainant, or in default thereof be absolutely debarred and foreclosed of and from all right and equity of redemption in and to said mortgaged premises, etc.

On file with the papers is the original bond from said Samuels to George W. Johnson, certified copy of the mortgage, and original assignment from George W. Samuels to complainant.

Summons to "the unknown heirs of George W. Samuels" issued, dated January 18, 1855, returnable on first Monday of March "next."

Returned: "The unknown heirs of George W. Samuels not found in my county this 27th of February, 1856."

Affidavit of non-residence of defendants filed January 18, 1855. Also stated that the names of said heirs of George W. Samuels were unknown to affiant.

Proof of publication of notice to defendants, filed March 25, 1856; said notice gives title of court and cause, the filing of bill and issue of summons therein and cites defendants to appear on the fourth Monday in March, 1855. Certificate of publisher attached, certifies that said notice has been published in the "Chicago Daily Democrat," four weeks consecutively, commencing with the 18th of January, 1855.

March 29th, 1856, (Record M, page 212) Order: It appearing to the court that due notice of the pendency of this suit has been given by publication according to law, it is therefore, on motion etc., ordered that said defendant or defendants, unknown as aforesaid, plead, answer or demur to complainant's bill instanter, and no answer being interposed it is referred to the master of Cook County to take proofs and report, etc.

Master's report, filed April 8th, 1855. Said master reports proofs taken before him and the amount due complainant of principal and interest $5,896.45, and that the mortgaged premises are insufficient in value on a sale thereof to pay the said mortgage debt.

April 9th, 1855, (Record M, page 267). Decree: It appearing to the court that a decree was heretofore made upon the hearing of this cause on March 29th, 1855, whereby it was referred to the master of this court to take proofs, etc., and it further appearing that the said master made his report in the premises on the 8th day of April, 1855, whereby he certifies that there was due to the above name decomplainant the sum of $5,896.45 for principal and interest, by virtue of said bond and mortgage and the assignment thereof, and futher, that the land described in said mortgage was not worth more than $5,000., and, if sold, would not pay the amount due to said complainant on said mortgage, which report was, by order of this court, dated April 8th, 1855, duly confirmed.

(No such confirmatory order found.)

Therefore, on motion, etc., it is ordered, adjudged and decreed that the said defendant do pay complainant, at the office of the clerk, the sum of $5,896.45 within fifteen months from the date of rendering this decree, and that complainant reconvey said premises to defendants, but that in default of such payment within fifteen months from the rendering of this decree, that said defendants from thenceforth do stand absolutely debarred and foreclosed of and from all right, title, interest, equity and benefit of redemption of, in and to said mortgaged premises, as the same are described in said mortgage mentioned in said bill of complaint.

"Johnson's Subdivision 9. "of "W. ½ S. W. ¼ "Sec. 12, Town 00, North, "Range 00, East "3d P. M. Doc. 79,890.

Map, entitled as in the margin.

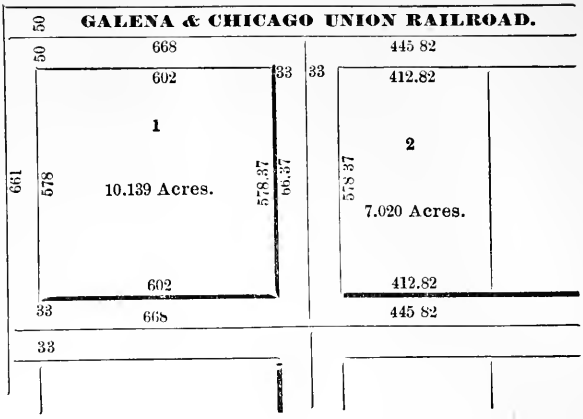
Recorded June 12, 1865, in book 1 of Plats, page 97.

Surveyor's certificate dated April 21, 1865.

Acknowledged by Abram Johnson, certificate dated May 5, 1865.

Approved by the Board of Public Work June 12, 1865.

Said map is in part as follows:



	Abram Johnson and	Power of attorney, dated September 25,
	Elizabeth, his wife,	1865.
10.	to	Filed September 29, 1865.
	William C. Smith.	Recorded in book 250, page 52.
	Doc. 81,845.	Said Abram and Elizabeth Johnson

make, constitute and appoint said William C. Smith their true and lawful attorney, for themselves and in their name, place and stead, to grant bargain and sell, all, or any part of any lot or lots, parcel or parcels of land owned by them in Johnson's subdivision of the W. ½ S. W. ¼ Sec. 12, Town. 00, North, Range 00, East 3d P. M., in Cook County, Illinois, for such price, and on such terms, and to such person or persons as he shall think fit and convenient; and also for them and in their name and as their act and deed, to sign, execute, acknowledge and deliver such deed or deeds, either with or without convenants of warranty, and conveyance or conveyances, for the absolute sale and disposal thereof, or any part thereof, and for the relinquishment of the dower interest of the said Elizabeth, wife of the said Abram Johnson, with such clause or clauses, covenant or covenants, agreement or agreements, including the release and waiver of the right of dower, as their said attorney shall think fit and expedient, giving and granting to their said attorney full power and authority to do and preform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully, to all intents and purposes, as they might or could do if personally present at the doing thereof, with full power of substitution and revocation, hereby ratifying and confirming all that their said attorney, or his substitute, shall lawfully do or cause to be done by virtue hereof.

	Abram Johnson and	Warranty Deed, dated July 15, 1868.
	Elizabeth, his wife,	Filed August 10, 1868.
	by Attorney in fact	Recorded in book 468, page 300.
11.	to	Consid. $3,500.
	James M. Brown.	Conveys Blocks 1 and 2 in Johnsons Sub-
	Doc. 146,670.	division of W. ½ S. W. ¼ Sec. 12, Town.
		00 North, Range, 00 East 3d, P. M.,

"Subject to taxes of 1868, and also to an unwritten lease of said "premises for the current year, to Jacob Zeder, at an annual rental of "$ 6.00 per acre, which the grantors reserve, and which said lease and "taxes are hereby excepted from the convenants herein."

Grantors sign by William C. Smith, their attorney in fact, who also acknowledges said instrument as the act and deed of the said Abram Johnson and Elizabeth Johnson, his wife.

———:o:———

TAX SALE.

12 Sale Aug. 26, 1870 (Sale commenced Aug. 10, 1870), for State and County etc.. Taxes of 1869, on Block 1, in Johnson's Subdivision of W. ½ S. W. ¼ Sec. 12, T. 00, N., R. 00, E., to W. K. Deboard for $ 56.00; Block 2 of Johnson's Subdivision aforesaid, to W. K. Deboard for $ 27.50.

Redeemed July 20, 1871, by James M. Brown.

We have examined our indexes to Records in Cook County, Illinois and find:

No conveyances of the premises described in the caption hereto, executed by any of the parties named herein as grantor or grantee, shown thereby to have been recorded in the Recorder's Office of Cook County, Illinois, except as shown on the ten preceding sheets.

No judgments rendered in any court of record in said Cook County, Illinois, against James M. Brown which are a lien on said premises.

No examination made for judgments against James Brown, nor against James Brown with any middle initial other than "M."

No taxes, or tax sales, or forfeitures of said premises, remaining unredeemed or uncanceled of record.

Instrument numbered two taken wholly from the Books of Original Entries and Indexes.

SMITH & JONES

Chicago, December 1st, 1885.

Abridgments in abstracts which fail to set forth every point material to the title, and which it is important should be examined and passed upon, are reliable only in proportion to the degree of confidence placed in the skill and experience of the abstractor. A perfect abstract will present every point necessary to show a complete history of the title to the land in question, sufficiently minute to enable counsel to pass absolutely—not hypothetically—upon the state of such title, without resort to the records, documents or extrinsic evidence affecting the same; the function of the abstractor being to furnish the facts which enable counsel to apply the law as certainly as though the original documents and proofs were before him.

The points necessary to be noted in the abstract will, of course, vary according to the local laws and circumstances of the particular case. It would be impossible to suggest forms applicable to all manner of transactions that will arise in the course of practice in the examination of titles. Indeed, it will seldom occur that any set form or phraseology will apply to two instruments of the same general nature, and for that reason the use of printed forms has been found impracticable, and the better informed class of practitioners have abandoned their use. Abstracts are no more matters of common form than are wills, or any other instrument that must conform in all parts to a special state of facts. No attempt will, therefore, be made at giving a complete set of forms, but a few examples are given by way of illustration.

ABSTRACT OF TITLE.

TO

THE NORTHWEST QUARTER OF SECTION TWENTY-ONE (21), TOWNSHIP THIRTY-NINE (39), NORTH, RANGE THIRTEEN (13), EAST OF THE 3D PRINCIPAL MERIDIAN, CONTAINING 160 ACRES, SITUATED IN COOK COUNTY, ILLINOIS.

	United States	Patent, dated July 1, 1848.
1.	to	Certificate No. 9,038.
	Daniel Williams.	General Land Office record, Vol. 51, page
	Doc. 20,320.	367.

Recites the filing of certificate, showing payment in full, according to act of Congress, etc.

Grants to Daniel Williams, "his heirs and assigns forever," the land described in the caption hereof.

[SEAL.] By the President,

JAMES K. POLK.

S. H. Laughlin,
Recorder Gen'l Land Office. By J. K. Stephens, Act. Sec'y.

Filed for record June 3, 1850, and recorded in book 30, page 261.

	Daniel Williams and	Warranty Deed, dated May 10, 1869.
	Mary B., his wife,	Consid. $3,500.
	Chicago, Ill.	The receipt of which is acknowledged.
2.	to	"Grant, bargain, sell, convey and con-
	James Brown.	firm unto the said James Brown his heirs
	$5.00 Stamp.	and assigns forever," etc., land described
	Doc. 195,886.	as in the caption hereof.

With the usual convenants for seisin, right to convey against incumbrances and of warranty against all persons.

Attest hands and seals.

In Presence of	Daniel Williams.	[SEAL.]
John Jones.		
Thos. Smith.	Mary B. Williams.	[SEAL.]

Acknowledged May 10, 1869, in the county of Cook, and State of

Illinois, before James Brown, a Notary Public, in and for said county. Certificate states that the grantors, naming them, personally appeared, were personally known, and acknowledged that they executed the within and foregoing intsrument, etc.; and that said Mary B., etc., being examined separate and apart from her husband, and having contents and meaning of said instrument explained to her, acknowledged that she relinquished her dower and waived all right, etc., under Homestead and Exemption Laws.

Signed and attested by notarial seal.

Filed for record May 11, 1869, and recorded in book 100, page 56.

(The foregoing particulars taken from the original instrument.)

We have examined our indexes to Records in Cook County, Illinois. and find:

No conveyances of the premises described in the caption hereto, shown thereby to have been recorded in said county, except as shown on the two preceding pages.

No judgments rendered in any court of record in said county against James Brown, which are a lien upon said premises.

No taxes or tax sales, or forfeitures of said premises remaining unpaid or unredeemed or uncancelled of record.

No examination made as to any matter not herein mentioned.

SMITH & JONES.

Chicago, June 1st, 1870.

CONTINUATION OF ABSTRACT OF TITLE.

TO

THE NORTHWEST QUARTER OF SECTION 21, TOWNSHIP 39, NORTH, RANGE 13, EAST OF THE 3D P. M. = 160 ACRES, IN COOK COUNTY, ILLINOIS.

Last examination by us, dated June 1, 1870.

3.	In the matter of the Estate of James Brown. Deceased.	In the Probate Court of Cook County, Ill., Case 1, Box 269. Will of James Brown, dated October 9, 1883, filed, proven and admitted to probate in open court November 17, 1883.

(Recorded in Vol. 4, page 266.)

Testator disposes of his estate as follows:

1st. Directs that all his just debts and funeral expenses be paid by

his executor, hereinafter named, as soon as conveniently may be after his death.

2d. Makes sundry bequests of specific articles of personal property.

3d. All the rest, residue and remainder of his estate, both real and personal, he devises and bequeaths to Samuel C. Davis and John Brown, his executors "hereinafter" appointed, and to the survivor of them. In trust nevertheless, for the joint and equal benefit of his children, James Brown, Jr., William R. Brown, Anna M. Brown and Francis Brown, as "hereinatter specified and described." Directs that his executors and the survivor of them shall have and retain the possession and management of said residue and remainder of his estate, and receive the rents, income and profits thereof, so long as may be necessary for the execution of "this" his last will and testament, and he authorizes and empowers his said executors and the survivor of them to sell and dispose of all or any part of said real or personal estate at any time remaining in their possession or charge, either at public or private sale, at such times, for such price or prices, and upon such terms and conditions as to them shall seem best, and to grant and convey or deliver the same to the purchaser or purchasers, free from all obligations, on the part of such purchaser or purchasers, to see to the application of the purchase money; so much of the proceeds of any such sale or sales as may be required for that purpose may be applied by his said executors, or the survivor of them, to the payment of any mortgage liens outstanding upon the real estate not sold, or to the satisfaction of any valid claims against his estate. * * * * * He also authorizes and empowers his said executors, and the survivor of them, to borrow, from time to time, such sum or sums of money as may be required to pay off any mortgage lien existing upon the real estate "hereby" devised to them, if in their or his discretion it shall be thought best so to do, and to secure the payment of the money so borrowed by a mortgage or mortgages upon the said trust estate, or any part thereof, containing the usual provisions and covenants. * * * * *

When his said son William R. Brown shall have reached the age of 21 years, if he shall live to that age, or when he would have arrived at that age, had he survived, which will be on August 8, 1887, it is his will and direction that all the trust property and estate then in the hands or possession of his said executors, or the survivor of them, shall be carefully appraised and divided by said executors or the survivor of them into four equal portions or shares, as nearly as may be; or in case of the death before that time of either of his said four children, without leaving issue, into as many equal portions or shares as will suffice to give each of the four children then surviving, and the issue of each one who shall then be dead, leaving issue them surviving (such issue to take the shares which their respective parents would have taken if then living) one equal portion or share of said trust estate. One of said equal portions, or shares, of said trust estate he devises and bequeaths to each of said four children who shall then be living, and another of said equal portions or shares

he devises and bequeaths to the issue then surviving of each of said four children, who shall have died leaving issue, such issue taking the share their parent would have taken if then living; and he authorizes and empowers his said executors, and the survivor of them, to apportion said several shares between the respective persons entitled thereto, the share set apart and assigned to each to be designated and described in an instrument in writing to be executed under the hands and seals of said executors, or under the hand and seal of the survivor of them.

In case of the death of all his children without leaving issue before the time "hereinbefore" appointed for the appraisal and division of said trust estate, he devises and bequeaths the whole of said estate then remaining in the hands of his said executors to his (testator's) heirs at law.

4th. Nominates, constitutes and appoints Samuel C. Davis and John Brown, of Cook County, Illinois, executors of "this" his last will and testament, waiving security, and revokes all former wills by him at any time heretofore made.

5th. "It is hereby further declared and provided," that if either of said executors or any future executor or trustee hereof shall die (either before or after his acceptance of the trusts herein created), or go to reside out of the State of Illinois, desire to be discharged from, be removed, decline, or become incapable or unfit to act in the trusts of these presents, while the same trustees, or any of them, shall be subsisting, then, and in every or any such case, and so often as the same shall happen, it shall be lawful for the surviving, acting or continuing executor or trustee hereof, or the executors or administrators of the then last acting executor or trustee hereof (whether such surviving, acting or continuing trustee or executors or administrators, respectfully, shall be willing to act in other respects or not) by any writing under his or their hands, attested by two or more witnesses, to nominate and substitute any person to be executor or trustee hereof in the place of the executor or trustee, so dying, going out of the State to reside, desiring to be discharged, removing, declining or becoming incapable or unfit to act as aforesaid; and so often as any new executor or trustee hereof shall be appointed as aforesaid, all the trust estate which shall be and become legally and effectually vested in the acting trustee or trustees thereof, for the time being, to and for the same uses and upon the same trusts and with and subject to the same powers and provisions as are herein declared and contained, of and concerning the same trust estate, or such of the same uses, trusts, powers and provisions as shall then be subsisting or capable of taking effect; and every new trustee to be, from time to time, appointed as aforesaid, shall thenceforth be competent in all things to act in the execution of the trusts hereof, as fully and effectually and with all the same powers and authorities, to all purposes whatsoever, as if he had been originally appointed an executor or trustee in the place of the executor or trustee whom he shall, whether immediately or otherwise, succeed.

6th. Provides for an allowance from the principal of his estate for the suitable maintenance, etc., of his children, or either of them, in case the net income of his estate be insufficient therefor.

In testimony whereof, etc.

(Signed) James Brown.

Attesting Witnesses:
John Smith,
Samuel Jones,
William Watkins.

Petition of Samuel C. Davis and John Brown for proof of will and letters testamentary,

Filed Nov. 19, 1883.

Represents that James Brown died Nov. 9, 1883, leaving him surviving James Brown, Jr., William R. Brown, Anna M. Brown and Francis H. Brown, his children and only heirs at law.

That said deceased left real estate in Cook County, Illinois, etc.

Subscribed by petitioners and sworn to Nov. 17, 1883, before W. W. Black, Clerk of the Probate Court, of Cook County, Illinois.

Nov. 19, 1883 (Record W, page 100) Order: Recites that Samuel C. Davis and John Brown, of Cook County, Illinois, appeared and produced a writing purporting to be the last will and testament of James Brown, and filed petition for probate thereof and for letters testamentary:

And it appearing to the court from said petition that James Brown, of Chicago, in said county, departed this life on the 9th day of November, 1883, leaving said writing as and for his last will and testament; and thereupon John Smith, Samuel Jones and William Watkins, the subscribing witnesses to said will appeared, and in open court, on oath, testified that they were present at the execution of said will, and saw the said James Brown sign said will in their presence, and heard him declare the same to be his last will and testament; that they subscribed their names thereto as witnesses, in the presence of, and at the request of the testator and in the presence of each other, and that they believed the said testator was of sound mind and memory, and of lawful age at the time of signing said will, etc.

And it appearing to the court from said testimony that said will was duly executed and attested according to law, and that the said testator was of sound disposing mind and memory, and otherwise competent to make his will at the time of signing the same, it is ordered that said will be received and recorded as the last will and testament of the said James Brown, deceased.

And it is further ordered that letters testamentary on said will be issued to the said Samuel C. Davis and John Brown, the said executors named in said will, upon their filing bond as such executors in the penal sum of $50,000 each, conditioned as the law directs. Whereupon said Samuel C. Davis and John Brown present their said bond duly executed and take and subscribe the oath of office as said executors.

And the court having examined and approved the bond, it is ordered that letters testamentary be issued accordingly.

Bond of executors in the sum of $50,000 each, surety waived, filed and approved Nov. 19, 1883. (Recorded in Vol. 3, pages 410 and 411.)

Letters testamentary to Samuel C. Davis and John Brown issued, dated November 19, 1883. (Recorded in Vol. 3, page 310.)

Warrant to appraisers issued, dated Nov. 19, 1883.

Proof of publication and posting of notices for adjudication, filed Dec. 8, 1883, approved in open court. January 21, 1884.

Adjudication ordered January 21, 1884.

Sundry claims filed and allowed amounting in the aggregate to the sum of $4,566.99.

Appraisement bill filed and approved February 25, 1884.

Total value of said estate subject to appraisement $815.40.

Inventory filed and approved February 25, 1884, mentions real estate as follows:

The Northwest quarter of Section 21, Township 39, North, Range 13, East 3d P. M. (with other property).

Additional inventory filed February 13, 1885, and approved February 19, 1885, mentions no real estate.

4.	Affidavit by Samuel C. Davis.	Subscribed and sworn to December 31, 1885. (On file with the papers but not recorded.)

Recites that affiant was well acquainted with James Brown, who departed this life at the City of Chicago, November 9, 1883; that he is one of the executors of the last will and testament of said deceased, and from an intimate acquaintance with his family relations for many years prior thereto, affiant states, that he has good reason to believe and does believe that at the time of his death the said James Brown was a widower and left no wife him surviving.

(Sigued) Samuel C. Davis.

Jurat by John Smith, "Notary Public, in and for Cook County, Illinois," seal attached.

TAX MATTER.

5. Application made to the County Court, at the July Term thereof, for judgment against the Northwest quarter of Section 21, Township 39 North, Range 13, East 3d P. M., for Special Assessment No. 201, levied thereon by the Town of Blank, for water pipe in 51st street, etc. was on the 1st da y of September, 1882, withdrawn.

Said assessment amounting to $445, and remains unpaid or uncancelled of record.

NOTE: Receipt of John Smith, Treasurer of the Town of Blank, dated September 1, 1882, in favor of Samuel C. Davis and John Brown, Executors, for $445, in full for Special Assessment No. 201, on N. W. ¼ Sec. 21, T. 39 N., R. 13 East 3d P. M. Shown us this day.

SMITH & JONES.

Chigago, Sept. 5, 1885.

We have examined our indexes to Records in Cook County, Illinois, and find:

No conveyances of the property described in the caption hereof from James Brown, nor from Samuel C. Davis or John Brown, individually, or as executors of James Brown, deceased, and none from James Brown, Jr., William R. Brown, Anna M. Brown or Francis Brown, Jr., shown thereby to have been recorded in the Recorder's Office of Cook County, Illinois, since June 1st, 1870, except as herein stated.

No judgments rendered in any court of record in said county against any of the above named parties.

No taxes, or tax sales, or forfeitures of said premises, appearing on record as having been entered since June 1st, 1870, and not marked, cancelled, or paid, except as herein stated.

No other or further inquiries concerning said property made.

Ten (10) pages. SMITH & JONES.

Chicago, August 15, 1885.

The foregoing will be sufficient as an illustration. To attempt to go through the whole catalogue of conveyances, documents and proceedings, would swell this volume beyond our limits and, perhaps, serve no useful purpose.

It is always desirable for the examiner to have a written order from his client stating definitely what examination is required. This is desirable *first*, in order that he may have indisputable evidence to show for whom the abstract was prepared, should such evidence be required; and *second*, if the examiner is directed to omit any of the usual searches or to make the examination for a specified time only, he should have evidence to that effect.

In the absence of a written order the name of the client should always be inserted, either in the caption or the certificate, as a precautionary measure tending to limit the liability of the abstractor.

The following will serve as an example:

ORDER FOR EXAMINATION OF TITLE.

Chicago,.....188.....

HADDOCK, VALLETTE & RICKORDS:

Make an examination, according to your indexes to the records in Cook County, Illinois, of deeds, judgments and tax sales, of the title to the following described land in Cook County, Illinois,.....

.....

(Signed) .....

Address,.....

Under the English practice it is the custom, as we have seen, for counsel, upon perusal of the abstract, to make formal requisitions upon the solicitor for the vendor for such further evidence or information as may be required concerning the title, and to write the same on the left half of a sheet of paper folded down the middle, numbering each inquiry or objection consecutively and leaving the right half of the sheet blank for the replies of the solicitor to be entered thereon. The custom has never been adopted to any considerable extent in this country, nor can it be said to be equally applicable to our system of practice, but may sometimes be resorted to with advantage. As a rule such objections are set out in the opinion, thus:

OPINION OF TITLE.

TO

THE NORTHWEST ¼ OF SECTION 12, TOWNSHIP 39, NORTH, RANGE 13 EAST, AS DISCLOSED BY THE ANNEXED ABSTRACT, MADE BY HANDY & CO., DATED JANUARY 2D, 1886.

I have examined said abstract consisting of ten numbers contained on eight pages, exclusive of the certificate to same, and find:

(Set out the defects or objections.)

I am of opinion that the defect noted in the acknowledgment of No. 5, is cured by (refer to statute, or state reasons for such opinion).

I am further of opinion that the title to the fee of said premises is vested in (owner's name) free from incumbrances or adverse claims except as above enumerated.

To perfect the title in said (owner) I would recommend:

(State conveyances or releases required.)

I would further suggest (set out precautionary measures advised, such as requiries to be made of the tenant in possession or other persons, etc).

.....

Counsel for .....

INDEX.

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[The References are to Sections.]

N.

P.

[The References are to Sections.]

[The References are to Sections.]

S.

[The References are to Sections.]

T.

[The References are to Sections.]